85-2031

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

SOL C. SCHWARTZ AND RAYMOND F. LANE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROY T. ENGLERT, JR.
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Double Jeopardy Clause prohibits appeal when a district court determines that the government has failed to prove certain nonessential factual averments in the indictment, and then erroneously terminates the trial at the defendant's behest.

II

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Allen Dorfman, Frank Marolda, and Abe Chapman were named in the indictment. Dorfman died before trial. Marolda was dismissed from the case by the district court and did not appear in the court of appeals. Chapman was a party in the court of appeals, but the United States is not seeking review of the affirmance by the court of appeals of the district court's order dismissing Chapman.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals denying in part and granting in part the government's petition for rehearing (App., *infra,* 1a-15a) is reported at 785 F.2d 673. The original opinion of the court of appeals dismissing the government's appeal on double jeopardy grounds (App., *infra,* 16a-29a) is reported at 763 F.2d 1054. The oral and written orders of the district court (App., *infra,* 30a-39a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1985. A petition for rehearing was denied in part and granted in part on March 14, 1986. On May 6, 1986, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including June 11,

1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

An indictment returned in the United States District Court for the Northern District of California charged respondents and three others[1] with 11 counts of wire fraud, in violation of 18 U.S.C. 1343, and conspiracy to commit wire fraud, in violation of 18 U.S.C. 371.[2] The in-

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[1] Co-defendant Allen Dorfman died before trial. Co-defendant Frank Marolda was tried with respondents and was granted the same midtrial relief as respondents. The government did not appeal as to Marolda. Before respondents' trial, co-defendent Abe Chapman pleaded guilty to the conspiracy count. After the district court terminated respondents' trial, the court permitted Chapman to withdraw his guilty plea and dismissed the charges against him. See App., *infra*, 8a. The government appealed this dismissal, and the court of appeals affirmed. See App., *infra*, 8a-9a. Although we believe that this affirmance was erroneous, we have not challenged the judgment with respect to Chapman in this petition.

[2] The indictment also charged respondents in two counts (Counts 13 and 14) with accepting or soliciting a thing of value with the intent to

dictment alleged that respondents and their co-defendants conspired to defraud Locals 19 and 28 of the Hotel and Restaurant Employees Union (HREU) and six employee benefit plans of those locals.[3] Before trial, respondents moved to dismiss the indictment on grounds of duplicity. They claimed that the indictment alleged several objects of the scheme to defraud and that each object should be charged as a separate scheme. C.A. App. 15-23. The district court denied the motion, ruling that the indictment alleged a single unified scheme to defraud. App., *infra*, 5a.

1. A jury was empaneled, and the government presented evidence relating to the charges. Briefly summarized, the evidence showed that respondent Lane was the secretary-treasurer of Local 28 of the HREU in Oakland and Contra Costa.[4] He was also a trustee of his local's health and welfare pension benefit plans. In 1979, Lane pleaded guilty to embezzling union funds. Co-defendent Marolda was president of Local 19 of the HREU in San Jose. He too was a trustee of his union benefit plans. In 1978, Marolda was convicted and sentenced for embezzling union funds (App., *infra*, 2a).

Lane and Marolda feared that they would lose their union offices as a result of their convictions. To ensure

---

influence benefit plan trustees, in violation of 18 U.S.C. 1954. Those counts were dismissed before trial. The government appealed, and the court of appeals reversed, ordering that those counts be reinstated. App., *infra*, 9a-15a. Trial on the Section 1954 counts has been stayed pending the disposition of this petition.

[3] The six employee benefit plans are the Local 28 Oakland Welfare Fund; the Local 28 Oakland Pension Fund; the Local 28 Contra Costa Pension Fund; the Local 28 Contra Costa Welfare Fund; the Local 19 Welfare Fund; and the Local 19 Pension Fund (App., *infra*, 4a).

[4] Our statement of facts is taken principally from the appendix filed in the court of appeals. That appendix includes the transcripts of the tape-recorded conversations that constituted much of the evidence at trial.

their financial security, they plotted to merge their locals. They agreed that if either of them obtained a reversal of his conviction on appeal,[5] that person would run the merged locals and guarantee a lifetime income for the other man (GXs 101-1T, 101-3T, 101-10T, 102-13T; DXs B and C).

A merger of the locals, however, had to be approved by the international president of the HREU. The international president, Edward Hanley, was reluctant to authorize the merger of Locals 19 and 28. Lane and Marolda therefore enlisted the help of respondent Schwartz and co-defendents Abe Chapman and Allen Dorfman, whom Lane described to Marolda as "synonymous with crime" (GX 102-13T), to persuade Hanley to allow the merger. Schwartz, Chapman, and Dorfman were executives in the Amalgamated Insurance Agency of Chicago, which was in the business of administering union benefit plans. In return for their help in arranging the merger, Lane and Marolda agreed to reopen the bidding on the contracts to administer their locals' benefit plans and to rig the bidding so that Amalgamated would submit the lowest bid and would be awarded the lucrative contracts (GXs 56, 101-1T, 101-2T, 101-3T, 101-6T, 101-20T).

Lane thereafter discussed the merger with Hanley, but Hanley still did not agree to approve the merger. Schwartz then promised Lane that he would talk to Dorfman to see what could be done (GX 101-10T). On March 13, 1979, Lane and Schwartz discussed Amalgamated's takeover of the Oakland benefit plans. Lane told Schwartz that he would solicit a number of bids and "then when I get the bids in, I was going to mail them to you and let you know, so you can come in with the lowest one" (GX 101-13T).

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[5] Marolda's conviction was in fact reversed by the court of appeals in 1980. *United States* v. *Marolda*, 615 F.2d 867 (9th Cir. 1980).

On April 18, 1979, Schwartz told Chapman that "the merger's been taken care of." He warned, however, that, unless everything went through with the benefit plans, the merger would be called off. On May 7, 1979, Lane called Schwartz to confirm that he was putting the Oakland plans out to bid. He promised to send Schwartz the bids (GXs 101-20T, 101-21T, 101-26T). Ultimately, however, the merger was not approved and Amalgamated did not get the contracts to administer the benefit plans (GXs 101-24T, 101-25T, 101-29T, 101-35T, 102-4T, 102-12T, 102-13T, 102-18T, 102-23T, 102-25T, 102-42T, 102-43T, 102-47T, 102-48T, 103-2T, 103-7T, 103-10T, 103-11T, 103-21T, 103-26T, 103-27T, 103-42T).

2. At the close of the government's case, respondents moved for a judgment of acquittal, alleging that there was a fatal variance between the scheme to defraud alleged in the indictment and the government's proof at trial. Specifically, respondents alleged that the government had failed to prove every object of the scheme alleged in the indictment. C.A. App. 53-56. The district court granted the motion. The court explained that under then-current circuit precedent, a conviction could not be based on a scheme that was narrower than the one alleged in the indictment.[6] The court found that the government had failed to prove that respondents intended to defraud four of the six union benefit plans that were identified in the indictment. In particular, the court found that there was no evidence that respondents had conspired to deprive either the two Local 19 benefit plans or the two Local 28 Contra Costa plans of the services of Lane and Marolda as trustees. With respect to the two Local 28 Oakland benefit plans, however, the court did not make a finding of sufficiency.

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[6] The pertinent circuit authorities were *United States* v. *Mastelotto*, 717 F.2d 1238, 1250 (9th Cir. 1983), and *United States* v. *Miller*, 715 F.2d 1360 (1983), modified, 728 F.2d 1269 (9th Cir. 1984), rev'd, No. 83-1750 (Apr. 1, 1985).

Because the government's evidence had failed to establish that all six benefit plans were intended victims of the fraudulent scheme, the court held that respondents could not be convicted of participating in a "unitary scheme to defraud as charged in the indictment" (App., *infra,* 36a-37a). In a subsequent written order (App., *infra,* 30a), the court explained,

> the government has not presented sufficient proof as to a number of the benefit plans as alleged in Counts 1-12. Accordingly, because the government has not proven all of the objects of the fraud scheme, there is a fatal variance.

Although the court identified the legal error in the case as a "fatal variance," it denominated its ruling a "judgment of acquittal."

3. The government appealed pursuant to 18 U.S.C. 3731. The government argued that the district court's ruling was appealable because, despite its label, it was in fact an erroneous dismissal of the indictment rather than an acquittal. The government premised its argument on the undisputed fact that the district court never found that the government had failed to prove any of the essential elements of a wire fraud offense. Rather, the district court simply found that the government had failed to prove all the factual averments in the indictment, namely, that the defendents intended to defraud all six union benefit plans. The failure of proof as to four of the six benefit plans, the government argued, was not a failure to establish any essential element of the offense, either as set forth in the statute or as construed by the district court; it meant only that the scheme to defraud was narrower than was charged in the indictment. Since, as this Court made clear in *United States* v. *Miller*, No. 83-1750 (Apr. 1, 1985), the government may convict on proof that shows a scheme to defraud that is narrower than the scheme alleged in the

indictment, the government argued that it should be permitted to try respondents on either an amended indictment or a new indictment charging the narrower scheme to defraud.

The court of appeals held that the appeal was barred by the Double Jeopardy Clause. The court noted the government's argument that the trial court's action was in substance a dismissal of the indictment rather than a acquittal, and observed that "[i]n most cases, the government's argument would be well taken" (App., *infra*, 6a). According to the court of appeals, however, the district court had "acquitted" the defendents under the "peculiar rule" (App., *infra,* 7a) of the Ninth Circuit's earlier decisions in *Miller* and *United States* v. *Mastelotto*, 717 F.2d 1238 (9th Cir. 1983). The court reasoned that because the district court was applying this binding circuit precedent, which had held that the government was required to prove every object of the scheme to defraud that was alleged in the indictment, the district court did in fact "acquit" respondents for failure to prove some of the objects of the alleged scheme. In the view of the court of appeals, it was irrelevant that *Miller* had been reversed by this Court (App., *infra,* 7a-8a). Accordingly, the court of appeals dismissed the government's appeal. The court of appeals thereafter denied the government's rehearing petition to the extent that it addressed respondents' double jeopardy claim.[7]

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[7] The court of appeals granted the petition to the extent that it challenged the dismissal of the government's appeal from the district court's order dismissing the indictment as to Chapman. The court acknowledged that because Chapman had pleaded guilty, the government's appeal from the withdrawal of his plea and the dismissal of the indictment was not barred by the Double Jeopardy Clause. Nevertheless, the court affirmed the dismissal of the charges against Chapman. In our view that portion of the court's opinion was plainly incorrect, but we have chosen not to challenge the affirmance of Chapman's dismissal here.

REASONS FOR GRANTING THE PETITION

This case involves an important question not previously decided by this Court. That question is whether the Double Jeopardy Clause prohibits the government from taking an appeal any time a district court determines that the government has failed to prove certain nonessential factual averments in the indictment, and then erroneously terminates the trial at the defendent's behest. In this case, the court of appeals determined that the Clause does prohibit appeal. The Third Circuit reached the opposite result in *United States* v. *Maker,* 751 F.2d 614 (1984), cert. denied, No. 84-1419 (June 17, 1985).

The double jeopardy question turns on whether the district court's action was an "acquittal" or a dismissal of the indictment. *Smalis* v. *Pennsylvania*, No. 85-227 (May 5, 1986), slip op. 5; *United States* v. *Scott*, 437 U.S. 82, 91 (1978). An "acquittal" is defined by the trial court's actions, not the label it attaches to its ruling. "[A] defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.' " *Id.* at 97 (brackets in original) (quoting *United States* v. *Martin Linen Supply Co.,* 430 U.S. 564, 571 (1977)).[8] We submit that, when the district court resolved nonessential factual averments in the defendants' favor, it did not thereby resolve "some or all of the factual elements of the offense charged." Rather, it resolved factual questions that are *not* elements of the offenses of wire fraud and conspiracy and then reached the erroneous legal conclusion that this "fatal variance" (App., *infra,* 5a, 30a) required that the trial terminate.

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[8] Thus, the label applied by the district court to its ruling in this case—"judgment of acquittal"—is not dispositive of the question presented. See also *Lee* v. *United States,* 432 U.S. 23, 30 (1977); *United States* v. *Martin Linen Supply Co.,* 430 U.S. 564, 571 (1977); *Serfass* v. *United States,* 420 U.S. 377, 392 (1975).

The courts below did not identify any element of the offense of wire fraud that the government did not prove. It must be emphasized that the district court did not find the government's proof wanting with respect to two of the six benefit plans. Thus, even as characterized by the courts below, the district court's ruling did not constitute a finding of insufficiency with respect to any element of the offense.

The flaw that the district court perceived in the case was based on the Ninth Circuit's decisions in *Miller* and *Mastelotto,* which held that a defendant's Fifth Amendment right to be tried on indictment by a grand jury was violated when the proof at trial showed a narrower scheme to defraud than that contained in the indictment. See *United States* v. *Miller,* No. 83-1750 (Apr. 1, 1985), slip op. 4. Even before this Court's reversal of *Miller,* those decisions did not purport to change the "factual elements of the offense" of wire fraud or conspiracy; they simply interpreted the Grand Jury Clause to require that the scheme proved at trial be as broad as the scheme charged in the indictment (see App., *infra,* 7a).[9] Therefore, when the district court terminated the trial in the present case on the authority of *Miller* and *Mastelotto,* it necessarily decided that the Grand Jury Clause precluded prosecution under

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[9] The Ninth Circuit took some pains in *Miller* to explain that the necessary "element" of the offense of mail fraud is the existence of a scheme to defraud. The reversal of the conviction in *Miller* was not based on the government's failure to prove that "element," but on the variance between the scheme alleged in the indictment and the scheme proved at trial (728 F.2d at 1270):

> The existence of a scheme to defraud is an element of the crime of mail fraud. [Citation omitted.] The government must prove false statements or fraudulent acts in order to show the defendant's specific intent to defraud. [Citation omitted.] [Prior Ninth Circuit] cases simply hold that the government's proof of fraudulent intent may be sufficient even if it does not prove every fraudulent act alleged in the indictment. Nothing in them conflicts with the

the particular indictment before the court, not that the unproven averments in the indictment were "factual element[s] of the offense." The Grand Jury Clause holding represents "a legal judgment that a defendant, although criminally culpable, may not be punished because of a supposed constitutional violation." As such, it may be appealed. *United States* v. *Scott,* 437 U.S. 82, 98 (1978) (footnote omitted).[10]

When the necessary elements of a crime are proven at trial, but the indictment is dismissed at the defendant's behest because it fails to charge all the necessary elements, there is no double jeopardy bar to retrial under a new indictment. *Lee* v. *United States,* 432 U.S. 23 (1977); *Illinois* v. *Somerville,* 410 U.S. 458 (1973). If the dismissal of an indictment in those circumstances does not constitute an "acquittal," it is hard to see how there can be an "acquittal" when the necessary elements of a crime are proven at trial, but the indictment is dismissed at the defendant's behest because it charges *more than* all the necessary elements. To be sure, the averments that were not proved at trial may not be the subject of further proceedings. And, if the district court had found that the government had failed to prove any element of the crimes of wire fraud or conspiracy, we would agree that the court

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principle that the jury must find the existence of substantially the same fraudulent scheme as that charged by the grand jury.

See also *United States* v. *Miller,* No. 83-1750 (Apr. 1, 1985), slip op. 5. In *Mastelotto,* the court could hardly have been asserting that its decision rested on the government's failure to prove an element of the offense charged, for the court of appeals ordered a new trial as the remedy for the alleged violation of the right to indictment by a grand jury. 717 F.2d at 1251.

[10] Because the "essential character" of the district court's ruling related to the Fifth Amendment's grand jury guarantee, not to guilt or innocence (see *Scott,* 437 U.S. at 98 & n.11; *Smalis* v. *Pennsylvania,* No. 85-227 (May 5, 1986), slip op. 5 & n.7), this case is not like *Smalis,* in which the trial court had found the evidence insufficient to satisfy what it regarded as an essential element of the offense.

had "acquitted" respondents, and our appeal and an ensuing retrial would be barred by the Double Jeopardy Clause. See *Smalis* v. *Pennsylvania, supra.* But that did not occur. The district court merely found that the government had failed to prove additional facts that the court mistakenly believed had to be proved in order to protect the defendants' rights under the Grand Jury Clause. The court's Grand Jury Clause ruling, like other midtrial dismissals, is appealable.

A contrary result does not follow from *Sanabria* v. *United States,* 437 U.S. 54 (1978). In *Sanabria,* the defendant was charged with conducting an illegal gambling business that involved both horse betting and wagering on numbers. The government did not present any evidence at trial connecting Sanabria to horse betting, but relied entirely on Sanabria's involvement in the numbers branch of the business. During the government's case in chief, however, the district court suppressed all the government's proof pertaining to numbers betting. The district court then acquitted Sanabria on the overall gambling charge, because no evidence remained on which to convict him. This Court held that the government could not appeal the district court's suppression and acquittal orders, because a retrial of Sanabria on the gambling charge would violate the Double Jeopardy Clause. As the Court explained (437 U.S. at 71 (citation omitted)), Sanabria "was found not guilty for a failure of proof on a key 'factual element of the offense charged': that he was 'connected with' the illegal gambling business." In this case, by contrast, neither court below found that the government had failed to prove an element of wire fraud or conspiracy; the district court merely found that the government's failure to prove averments in the indictment resulted in a violation of respondents' rights under the Grand Jury Clause. Consequently, respondents have not been "acquitted" of the charged offenses.

In circumstances indistinguishable from the present case, the Third Circuit held that the Double Jeopardy Clause did not bar a retrial. *United States* v. *Maker, supra.* In *Maker,* the district court ruled in the middle of a mail fraud trial that the government had failed to prove that the defendant, when he conceived the scheme to defraud, intended to accomplish all the objectives of the scheme that were alleged in the indictment. Citing this failure of proof, the district court dismissed the indictment without submitting the case to the jury. The government appealed. Maker contested the Third Circuit's jurisdiction by arguing that he had been acquitted, rightly or wrongly, on the mail fraud charges, and that the Double Jeopardy Clause therefore barred a retrial. The court of appeals held that the government's appeal was not barred because "the district court's arguable factual finding did not actually determine in Maker's favor any of the essential elements of the crime with which he was charged" (751 F.2d at 623).

The decision of the Ninth Circuit in this case squarely conflicts with the decision of the Third Circuit in *Maker.* Moreover, the ruling of the court of appeals in this case raises doubts about the double jeopardy consequences of every district court order granting relief to a defendant because of a fatal variance between the allegations in the indictment and the proof at trial. When a district court grants relief because of such a variance, the relief is granted because of a violation of the Grand Jury Clause or the requirement of notice, not because of the insufficiency of the evidence to prove an offense. See, *e.g., Russell* v. *United States,* 369 U.S. 749 (1962); *Stirone* v. *United States,* 361 U.S. 212 (1960). In such cases, the appropriate remedy should be to grant the defendant a new trial, not to exonerate him altogether. Under the Ninth Circuit's analysis in this case, however, it would appear that any order terminating a trial because of a fatal variance be-

tween the indictment and the proof would bar any further proceedings against the defendant, even though the proof at trial may have been amply sufficient to establish all the elements of the charged offense. A rule that offers such a windfall to defendants is an extravagant and significant extension of the Double Jeopardy Clause that warrants correction by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROY T. ENGLERT, JR.
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

JUNE 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 83-1276, 84-1102
D.C. No. CR 83-0008-2, 3, 4, 5 WHO

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

SOL C. SCHWARTZ, RAYMOND F. LANE, FRANK C. MAROLDA, AND ABE CHAPMAN, DEFENDANTS-APPELLEE.

Appeal from the United States District Court
for the Northern District of California

No. 83-1276
Argued April 11, 1984—San Francisco, California
Submitted March 12, 1985

No. 84-1102
Argued March 12, 1985—San Francisco, California
Submitted April 2, 1985

Filed March 14, 1986

On Petition for Rehearing—Granted in Part,
Denied in Part

Before: Ben. C. Duniway and J. Blaine Anderson, Ciruit Judges, and John C. Coughenour,* District Judge.

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* The Honorable John C. Coughenour, United States District Judge for the Western District of Washington, sitting by designation.

OPINION

ANDERSON, Circuit Judge:

It is ordered that the petition for rehearing is DENIED IN PART and GRANTED IN PART.

The opinion filed June 18, 1985 (763 F.2d 1054) is withdrawn.

In these consolidated appeals, the United States challenges the district court's dismissal of a total of fifteen counts, which were originally brought against the defendants under one indictment. We reverse as to the counts involved in Appeal No. 83-1276 and we dismiss Appeal No. 84-1102 because we find it is barred by the Double Jeopardy Clause.

I. BACKGROUND

Defendant Marolda was president of Local 19, the San Jose affiliate of the Hotel and Restaurant Employees Union (HREU). Defendant Lane was secretary-treasurer of HREU Local 28 in Oakland-Contra Costa. Both men also served as trustees of their union's health and welfare and pension benefit plans. In 1978, Marolda was convicted and sentenced for embezzling union funds.[1] In 1979, Lane pled guilty to one count of embezzling union funds.

The government alleged, and sought to prove at trial, that due to these criminal convictions, Marolda and Lane were in danger of losing their union offices. In an effort to salvage the situation, the government alleged, Lane and Marolda agreed to merge their two locals, thereby eliminating election challenges the two were facing. One of the two was allegedly to remain in control of the merged union in order to ensure the financial health of both men.

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[1] Marolda's conviction was reversed by this court on appeal. *United States v. Marolda*, 615 F.2d 867 (9th Cir. 1980).

A merger required the approval of the HREU International president, however, and the president in this case proved to be reluctant. In order to persuade the International president to approve the merger, Lane allegedly enlisted the help of defendants Schwartz and Chapman, executives affiliated with Amalgamated Insurance Agency of Chicago. Lane allegedly hoped that the Chicago defendants would be able to exert a certain amount of favorable influence over the International president. In return for this favorable influence, claimed the government, Lane and Marolda agreed to reopen bidding on their respective locals' benefit plans and eventually award the administration of those plans to the Chicago defendants.

From this alleged factual scenario, a federal grand jury indicted the defendants on fifteen counts. Count One alleged a conspiracy to commit wire fraud, in violation of 18 U.S.C. §§ 371, 1343. Counts Two through Twelve charged defendants with separate criminal acts of wire fraud, in violation of 18 U.S.C. § 1343. Counts Thirteen and Fourteen alleged violations of 18 U.S.C. § 1954 by accepting or soliciting a *thing of value* with the intent to influence benefit plan trustees. Count Fifteen charged Lane and Marolda with conspriacy to violate 29 U.S.C. § 501(c) by allegedly arranging for a life salary for Marolda.

On October 21, 1983, the district court dismissed Counts Thirteen and Fourteen, finding that the conduct alleged in the indictment is not criminalized by section 1954. These two counts were severed for purposes of appeal, and the district court refused to stay the February 21, 1984 trial date on the remaining counts. The government's appeal of the dismissal of Counts Thirteen and Fourteen proceeded to oral argument before this court (No. 83-1276).

Meanwhile, defendants' jury trial on the remainder of the indictment began as scheduled. At the close of the government's case, the district court granted defendant's

motion for acquittal on all remaining counts.[2] The government appeals this judgment as well (No. 84-1102). We consolidated the cases for consideration on appeal.

II. DISCUSSION

The questions involved in this appeal, whether or not the Double Jeopardy Clause bars appeal and the statutory construction of section 1954, are legal questions. As such, we are permitted to review them freely under the *de novo* standard of review. *United States* v. *McConney,* 728 F.2d 1195 (9th Cir.) (en banc), *cert. denied,* 105 S.Ct. 101 (1984).

A. *No. 84-1102*

Defendants Lane and Marolda were, in addition to officers of their respective locals, trustees of a total of six benefit plans: (1) Local 28 Oakland Welfare Fund; (2) Local 28 Oakland Pension Fund; (3) Local 28 Contra Costa Welfare Fund; (4) Local 28 Contra Costa Pension Fund; (5) Local 19 Welfare Fund; and (6) Local 19 Pension Fund.

Counts One through Twelve of the indictment alleged three common objectives of the scheme to defraud. The first objective was to deprive the two locals of the loyal and honest services of Lane and Marolda in the performance of their duties as officers. The second alleged objective was to deprive the six benefit plans of the loyal and honest services of Lane and Marolda in their roles as

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[2] Shortly before trial, defendant Chapman pled guilty to the conspiracy count as part of a plea agreement. As a result, Chapman was not tried with the other defendants.

After the trial ended in favor of the other defendants, Chapman moved to withdraw his guilty plea, pursuant to Fed. R. Crim. P. 32(d), and to dismiss the case. The district court granted the motion. This puts Chapman's appeal in a different posture than that of the other defendants, as discussed *infra.*

trustees. The third objective charged was to obtain money and property from the two locals and their respective benefit plans by false and fraudulent pretenses.

The defense moved pretrial to dismiss the indictment on grounds of duplicity and vagueness. The district court denied the motion, relying on *United States* v. *Mastelotto,* 717 F.2d 1238 (9th Cir. 1983). The court reasoned that the transactions alleged in the wire fraud counts were "within the conceivable contemplation of a greedy mind" and, therefore, could be viewed as one unitary scheme to defraud. The court went on to caution the government, however, that under *Mastelotto* it would be required to prove the entire unitary scheme or, in other words, it must prove all three objectives as to each benefit plan and local as alleged in the indictment.

Subsequently, when the government finished its case-in-chief, the district court granted defendant's motion for judgment of acquittal, pursuant to Fed. R. Crim. P. 29. Citing *Mastelotto* and *United States* v. *Miller,* 715 F.2d 1360 (9th Cir. 1983), *modified,* 728 F.2d 1269 (1984), *rev'd,* __U.S.__, 85 L.Ed.2d 99 (1985), the court ruled that there was a fatal variance because the government failed to present sufficient proof as to a number of the benefit plans as alleged in Counts One through Twelve, and, therefore, had not proven all of the objects of the unitary fraud scheme.[3] The government now appeals, arguing that the district court's actions amounted to a dismissal rather than acquittal, thereby allowing this appeal and eventually a new trial on a narrower indictment.

Appellate jurisdiction over government appeals in criminal cases is authorized by 18 U.S.C.§ 3731, except when the Double Jeopardy Clause bars further prosecution. It is settled law under the Double Jeopardy Clause

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that "[a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed . . . ." *United States* v. *Scott,* 437 U.S. 82, 91, 57 L.Ed.2d 65, 74, 98 S.Ct. 2187 (1978) (footnote omitted). In determining whether an appeal is barred by the Clause, the Supreme Court has instructed that the label applied by the district court, whether "acquittal" or "dismissal," is not dispositive. "The trial judge's characterization of his own action cannot control the classification of the action." *Scott,* 437 U.S. at 96, 57 L.Ed.2d at 77. Thus, applying substance over form to a district court's judgment of acquittal, appeal is barred if the court "evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." *United States* v. *Martin Linen Supply Co.,* 430 U.S. 564, 572, 51 L.Ed.2d 642, 651, 97 S.Ct. 1349 (1977).

The crucial inquiry before this court, therefore, is to determine whether the district court's judgment was a true acquittal as evidenced by a legal evaluation of the government's case. For its part, the government readily admits that certain parts of the indictment were specifically dismissed for lack of evidence, thereby amounting to an acquittal as to those parts. The government does not appeal those specific findings. The crux of the government's argument, however, is that despite the label of "acquittal" used by the court, the judgment on Counts One through Twelve was in fact partly "a dismissal" based on the ruling of law that there was an impermissible variance. The government opines, therefore, that it is not barred from appealing or seeking a retrial on the individual parts of the scheme which the district court did not specifically reject for lack of sufficient evidence.

In most cases, the government's argument would be well taken. This case, however, involved an indictment for wire fraud. As such, the district court correctly recognized

Mastelotto and *Miller* as the governing circuit authority. Together, *Mastelotto* and *Miller* established a special framework for consideration of wire fraud indictments in this circuit. The rule of *Miller,* based on the Fifth Amendment's grand jury guarantee, was that a conviction could not stand where the trial proof showed a fraudulent scheme much narrower than, even though wholly included within, the scheme indicted by the grand jury. The reasoning was that a grand jury's willingness to indict someone for a broad wire fraud scheme does not establish that the same grand jury would have indicted the person for a substantially narrower scheme.

The district court recognized this peculiar rule and, from the beginning, exhibited an understanding of it as well as an intention to hold the government to its directive. The government was specifically warned before trial that it was required to comply. When the government did not comply, the court explained to the jury, in terms of the Ninth Circuit case law, why it was granting defendants' motion for acquittal. The court explained that in light of the lack of evidence on several elements of the broad scheme, "a reasonable juror could not find beyond reasonable doubt that the defendants had participated in a unitary scheme to defraud as charged in the indictment." Thereafter, the court entered an order granting judgment of acquittal.

The actions and words of the district court clearly show that it evaluated the government's evidence under the prevailing legal standards and determined that that evidence was legally insufficient to sustain a wire fraud conviction as indicted. This can only amount to an acquittal on all thirteen courts that went to trial.

Interestingly, the Supreme Court granted certiorari in *Miller* after the district court entered its judgment, and very recently issued a unanimous opinion reversing this circuit.__U.S.__, 85 L.Ed.2d 99 (1985). Nevertheless, the

reversal of *Miller* is inconsequential to this case. Inasmuch as we find the judgment below to be a true acquittal, the Double Jeopardy Clause bars appeal even if the district court based the acquittal on an erroneous interpretation of governing legal principles or upon legal principles which are themselves subsequently overturned. *Scott,* 437 U.S. at 98, 57 L.Ed.2d at 79; *Sanabria* v. *United States,* 437 U.S. 54, 64, 57 L.Ed.2d 43, 54, 98 S.Ct. 2170 (1978).

Consequently, because the district court's judgment was an acquittal, the appeal in No. 84-1102 is barred by the Double Jeopardy Clause and must be dismissed. As noted previously, however, defendant Chapman's situation is different, by virtue of the fact that he pled guilty and did not go to trial. The district court allowed Chapman to withdraw his guilty plea and then dismissed the indictment against him.

The district court has the discretion under Fed. R. Crim. P. 32(d) to allow withdrawal of a guilty plea for "fair and just reason." *United States* v. *Castello,* 724 F.2d 813, 814 (9th Cir.), *cert. denied,* 104 S.Ct. 3540 (1984). There is no question that the district court's sole reason for permitting Chapman to withdraw his plea was the fact that his codefendants had been acquitted of the same conspiracy charge because of the government's lack of sufficient evidence. We are satisfied that the district court did not abuse its discretion in permitting the withdrawal under the circumstances of this case. Thus, we will not reinstate Chapman's criminal conviction.

This does not mean, however, that the government's appeal of the indictment dismissal is barred by the Double Jeopardy Clause in the same manner as the other defendants. The Supreme Court held in *Scott* that "an appeal is not barred simply because a ruling in favor of a defendant 'is based upon facts outside the face of the indictment,' . . . or because it 'is granted on the ground . . . that the defendant simply cannot be convicted of the offense

charged.' " 437 U.S. at 96-97, 57 L.Ed.2d at 78 (quoting *United States* v. *Wilson,* 420 U.S. 332, 348 (1975) and *Lee* v. *United States,* 432 U.S. 23, 30 (1977)). If the defendant deliberately and successfully avoids submission of the indictment to the trier of fact by persuading the trial court to dismiss it on a basis which does not depend on guilt or innocence, then he "suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal . . ." *Id.* at 99, 57 L.Ed.2d at 79.

There has been no factual determination of guilt or innocence in Chapman's case. Chapman was not tried on the indictment. It is irrelevant that Chapman would have, had he not pled guilty, likely been tried along with the other three defendants, and acquitted with them as well. Before a trier of fact could hear evidence in a trial against him, Chapman requested that the district court dismiss the indictment against him. In doing so, the district court ruled as a matter of law that Chapman could not be convicted under the indictment because of the rule in *Miller.* In our opinion , this was a legal ruling to dismiss on a basis which did not depend on Chapman's guilt or innocence. Thus, the Double Jeopardy Clause does not bar the government's appeal of Chapman's dismissal. Nevertheless, we affirm the district court's legal ruling to dismiss the indictment under the rule of *Miller.* We are confident that the district court made the correct legal determination based on this circuit's authority at that time.

B. *No. 83-1276*

The government also appeals the district court's pretrial dismissal of Counts Thirteen and Fourteen of the indictment, which charged defendants with violating 18 U.S.C. § 1954. Section 1954 prohibits the offer, acceptance, or solicitation of "any fee, kickback, commission, gift, loan, money, or *thing of value*" because of or with intent to influence the actions or duties of union benefit plan trustees

(emphasis added). Counts Thirteen and Fourteen alleged that defendants Schwartz and Chapman agreed to give, and defendants Lane and Marolda agreed to receive, "assistance in arranging for the merger of Local 19 and Local 28, as well as other services," as a *thing of value* in exchange for influencing the actions of Lane and Marolda in their positions as benefit plan trustees.

Applying the rule of lenity, the district court held that the reference to *thing of value* in section 1954 cannot be read to encompass assistance in arranging the merger of two unions and "other services." Therefore, because the court decided the defendants' alleged actions were not criminalized by the statute, the two counts were dismissed and severed so that an immediate appeal could be taken.

The question of first impression left for this court to decide, therefore, is whether as a matter of law, the statutory scope of *thing of value* is broad enough to include the intangible of providing assistance in arranging a merger. In analyzing this question, the allegations of the indictment are presumed to be true. *United States* v. *Buckley,* 689 F.2d 893, 897 (9th Cir.), *cert. denied,* 103 S.Ct. 1778 (1983).

To determine the scope of section 1954, this court looks first to the language of the statute. If that language is unambiguous, and if Congress has not clearly expressed a contrary intent, we will regard that language as conclusive. *Russello* v. *United States,* 464 U.S. 16,____, 78 L.Ed.2d 17, 20, 104 S.Ct. 296 (1983). Furthermore, when a term such as *thing of value* has not been specifically defined in the statute, we will assume that the ordinary meaning of the words express the legislative purpose behind them. *Id.*

The defendants urge that *thing of value* should be limited to tangible things with ascertainable monetary value. Ordinarily, however, the measure of value is not limited to commercial or monetary worth. We have recognized a common, broader interpretation of value. In

United States v. *Sheker,* we held that information can be a *thing of value*:

> For instance, state secrets might trade hands without cash consideration. Information obtained for political advantage might have value apart from its worth in dollars. In each case the information sought would have value to others, in addition to the seeker.

618 F.2d 607, 609 (9th Cir. 1980) (holding information regarding the whereabouts of a witness was a *thing of value* under 18 U.S.C. § 912). Indeed, that value commonly extends in scope to include intangibles has been the conclusion of various courts when faced with the task of construing criminal statutes that contain the term *thing of value.*

In *United States* v. *Croft,* 750 F.2d 1354 (7th Cir. 1984), the defendant was convicted of converting to his own use a *thing of value* of the government, in violation of 18 U.S.C. § 641. The *thing of value* at issue was the labor of a government employee, whose research work product was appropriated by the defendant for private gain. The Seventh Circuit squarely held that intangible services do constitute a *thing of value.* 750 F.2d at 1361-1362.

The Second Circuit in *United States* v. *Girard,* 601 F.2d 69 (2d Cir.), *cert. denied,* 444 U.S. 871 (1979), held that the sale of information is a *thing of value*, reasoning that "[t]hese words are found in so many criminal statutes throughout the United States that they have in a sense become words of art. The word 'thing' notwithstanding, the phrase is generally construed to cover intangibles as well as tangibles." 601 F.2d at 71. The *Girard* opinion reviews some of the intangibles which have been held to be *things of value*, including amusement, sexual intercourse or the promise of sexual intercourse, the promise to reinstate an employeee, and an agreement not to run in a primary election. *Id.* Furthermore, the testimony of a witness

has been held to be a *thing of value. United States* v. *Zouras,* 497 F.2d 1115, 1121 (7th Cir. 1974) (construing 18 U.S.C. § 876, which prohibits extortion of "money or other thing of value"). And, in a very broad construction, *thing of value* has been applied to commercially worthless stock which a defendant "believed" had value for himself. *United States* v. *Williams,* 705 F.2d 603, 623 (2d Cir.), *cert. denied,* 104 S.Ct. 524 (1983) (construing bribery statutes, 18 U.S.C. §§ 201(c), 201(g)).

It is clear then, that in the ordinary sense *thing of value* is not limited in meaning to tangible things with an identifiable commercial price tag. The defendants, however, argue that the ordinary interpretation is not applicable to section 1954 because of "crucial differences" between the statutory structure and legislative intent of section 1954 and other statutes. Defendants posit that the scope of *thing of value* is narrowed in section 1954 to include only tangibles with ascertainable value because the phrase is preceded by the terms "fee, kickback, commission, gift, loan, [and] money." We are not persuaded.

The legislative history of section 1954 indicates that the enumeration of terms preceding *thing of value* was intended as inclusory, rather than limiting, language. The initial House version of the statute contained "money or other thing of value" as the only description of prohibited items. *See* Conf. Rep. No. 1417, 87th Cong., 1st Sess. 13 (1962). Concerns were subsequently raised about the need to ensure that forms of improper influence less blatant than direct money payments would be covered by the statute. These concerns were raised, in part, because of the Department of Justice's experience in enforcing the *thing of value* provision of Section 302 of the Taft-Hartley Act (29 U.S.C. § 186). S. Rep. No. 908, 87th Cong., 1st Sess. 13-14 (1961). In response to these concerns, the House version was amended to expressly include the additional terms. Conf. Rep. No. 1417, 87th Cong., 1st Sess. 13 (1962).

Nothing in the legislative history of section 1954 suggests that Congress intended *thing of value* to be construed more narrowly than in other statutes employing the phrase. Congress was concerned with violations of trust and fiduciary duties by union fund trustees. *See United States* v. *Romano,* 684 F.2d 1057, 1063 (2d Cir.), *cert. denied,* 103 S.Ct. 375 (1982). A violation of trust which is influenced by the offer of an intangible service is no less damaging to trust fund beneficiaries than if the influence was in the form of a cash kickback. The significant factor is that the trustee sufficiently valued the thing offered to compromise his integrity and position. We do not, therefore, find the language of section 1954 to be ambiguous. The very words and purpose of the statute show that Congress clearly intended the scope of *thing of value* to include intangibles such as are alleged in the instant indictment. As Justice Holmes said, " ' . . . there is no canon against using common sense in construing laws as saying what they obviously mean.' " *Croft,* 750 F.2d at 1362 (*quoting Roschen* v. *Ward*, 279 U.S. 337, 339, 73 L.Ed. 722, 728, 49 S.Ct. 336 (1929)).[4]

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[4] Although not cited to us by any party, we are mindful of this court's decision in *Chappell* v. *United States,* 270 F.2d 274 (9th Cir. 1959), which held that appropriating the services of another does not constitute a *thing of value* under 18 U.S.C. § 641. That decision has been criticized as a "limited, narrow, and unrealistic interpretation." *Croft,* 750 F.2d at 1362. Moreover, this court has not cited *Chappell* in support of its limited interpretation of *thing of value* since that case was decided in 1959, Rather, in the few situations presented to us, we have tended clearly toward a broader scope of *thing of value*, to include intangibles. *See, e.g., Sheker,* 618 F.2d at 609 (holding information can be a *thing of value*); *United States* v. *Friedman,* 445 F.2d 1076 (9th Cir.), *cert. denied,* 404 U.S. 958 (1971) (implicitly holding that government information is a *thing of value* under 18 U.S.C. § 641); *Whaley* v. *United States,* 324 F.2d 356 (9th Cir. 1963) (implicitly holding that information can be a *thing of value*).

Finally, the legislative history we have cited concerning the scope of *thing of value* is at odds with the decision in *Chappell.* Under these cir-

Because we find the statute to be unambiguous in this situation, we have no reason to apply the rule of lenity. That rule only comes into play at the end of the statutory construction process in situations where the language of the statute is not clear. We find that the district court erred in reading section 1954 as ambiguous, and also erred in applying the rule of lenity.

As a result, we must remand No. 83-1276 to the district court. Our earlier holding that the Double Jeopardy Clause bars appeal in No. 84-1102 does not affect the appeal in No. 83-1276. This is for the obvious reason that the subject counts of No. 83-1276 were dismissed prior to trial, and, therefore, the defendants have not yet been placed in jeopardy. Nevertheless, those counts are affected by the collateral estoppel doctrine.

United States v. *Hernandez,* 572 F.2d 218, 220 (9th Cir. 1978), sets out the three-step inquiry this court follows for collateral estoppel analysis in criminal cases. First, the issues in the two actions are identified so that we may determine whether they are sufficiently similar and material to justify invoking the doctrine. Second, we examine the first record to determine whether the issue was fully litigated. Finally, from our examination of the record, we ascertain whether the issue was necessarily decided.

Applying this analysis, it is initially most obvious that the allegations underlying Counts One through Twelve and Counts Thirteen and Fourteen establish that the trial of Counts One through Twelve involved factual issues substantially similar to those posed by Counts Thirteen and Fourteen. The benefit plan corruption alleged in Counts Thirteen and Fourteen was, after all, part of the overall scheme to defraud alleged in Counts One through Twelve.

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cumstances, the validity of the *Chappell* holding as binding authority in this circuit is seriously undermined. Because of this subsequent history, we believe we are correct in rejecting *Chappell.*

Second, it is equally obvious that the government did fully litigate the issues involved in Counts One through Twelve at trial. As noted above, the district court warned the government it would have to prove all components of the unitary scheme to defraud as alleged in the indictment. This strict requirement of proof required the government to fully litigate all the alleged objectives and false pretenses of the scheme at issue in Counts One through Twelve, including those involved in the benefit plan corruption at issue in Counts Thirteen and Fourteen.

Third, the district court specifically found that proof of the alleged fraudulent objectives with respect to four benefit plans—both Local 19 plans and both Local 28 Contra Costa plans—was insufficient: "There just isn't any evidence that Lane and Marolda and Schwartz conspired to deprive those plans of the Services of Lane and Marolda as trustees." These specific findings appear to be the only similar issues which were necessarily decided by the district court in granting the judgment of acquittal. Therefore, under the *Hernandez* inquiry, relitigation of these issues as against defendants is barred by the collateral estoppel doctrine. The allegations concerning the defendants' corrupt activities involving the two Oakland Benefit Plans of Local 28 remain as triable issues.

III. CONCLUSION

For the reasons expressed herein, the appeal in No. 84-1102 as to defendants Schwartz, Lane and Marolda is barred by the Double Jeopardy Clause and is hereby DISMISSED. The appeal in No. 84-1102 as to defendant Chapman is not barred by the Double Jeopardy Clause, and the district court's dismissal of the indictment is AFFIRMED. The district court's pretrial dismissal of two counts, challenged in No. 83-1276, is REVERSED and REMANDED for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 83-1276, 84-1102
D.C. No. CR 83-0008-2, 3, 4, 5 WHO

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

SOL C. SCHWARTZ, RAYMOND F. LANE, FRANK C. MAROLDA, AND ABE CHAPMAN, DEFENDANTS-APPELLEE.

Appeal from the United States District Court
for the Northern District of California

No. 83-1276
Argued April 11, 1984—San Francisco, California
Submitted March 12, 1985

No. 84-1102
Argued March 12, 1985—San Francisco, California
Submitted April 2, 1985

Before: DUNIWAY and ANDERSON, Circuit Judges, and COUGHENOUR,* District Judge.

OPINION

J. BLAINE ANDERSON, Circuit Judge:

In these consolidated appeals, the United States challenges the district court's dismissal of a total of fifteen counts, which were originally brought against the defendants under one indictment. We reverse as to the counts

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* The Honorable John C. Coughenour, United States District Judge for the Western District of Washington, sitting by designation.

involved in Appeal No. 83-1276 and we dismiss Appeal No. 84-1102 because we find it is barred by the Double Jeopardy Clause.

I. BACKGROUND

Defendant Marolda was president of Local 19, the San Jose affiliate of the Hotel and Restaurant Employees Union (HREU). Defendant Lane was secretary-treasurer of HREU Local 28 in Oakland-Contra Costa. Both men also served as trustees of their union's health and welfare and pension benefit plans. In 1978, Marolda was convicted and sentenced for embezzling union funds.[1] In 1979, Lane pled guilty to one count of embezzling union funds.

The government alleged, and sought to prove at trial, that due to these criminal convictions, Marolda and Lane were in danger of losing their union offices. In an effort to salvage the situation, the government alleged, Lane and Marolda agreed to merge their two locals, thereby eliminating election challenges the two were facing. One of the two was allegedly to remain in control of the merged union in order to ensure the financial health of both men.

A merger required the approval of the HREU International president, however, and the president in this case proved to be reluctant. In order to persuade the International president to approve the merger, Lane allegedly enlisted the help of defendants Schwartz and Chapman,

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[1] Marolda's conviction was reversed by this court on appeal. *United States* v. *Marolda*, 615 F.2d 867 (9th Cir. 1980).

executives affiliated with Amalgamated Insurance Agency of Chicago. Lane allegedly hoped that the Chicago defendants would be able to exert a certain amount of favorable influence over the International president. In return for this favorable influence, claimed the government, Lane and Marolda agreed to reopen bidding on their respective locals' benefit plans and eventually award the administration of those plans to the Chicago defendants.

From this alleged factual scenario, a federal grand jury indicted the defendants on fifteen counts. Count One alleged a conspiracy to commit wire fraud, in violation of 18 U.S.C. §§ 371, 1343. Counts Two through Twelve charged defendants with separate criminal acts of wire fraud, in violation of 18 U.S.C. § 1343. Counts Thirteen and Fourteen alleged violations of 18 U.S.C. § 1954 by accepting or soliciting a *thing of value* with the intent to influence benefit plan trustees. Count Fifteen charged Lane and Marolda with conspiracy to violate 29 U.S.C. § 501(c) by allegedly arranging for a life salary for Marolda.

On October 21, 1983, the district court dismissed Counts Thirteen and Fourteen, finding that the conduct alleged in the indictment is not criminalized by section 1954. These two counts were severed for purposes of appeal, and the district court refused to stay the February 21, 1984 trial date on the remaining counts. The government's appeal of the dismissal of Counts Thirteen and Fourteen proceeded to oral argument before this court (No. 83-1276).

Meanwhile, defendants' jury trial on the remainder of the indictment began as scheduled. At the close of the government's case, the district court granted defendant's motion for acquittal on all remaining counts. The government appeals this judgment as well (No. 84-1102). We consolidated the cases for consideration on appeal.

II. DISCUSSION

The questions involved in this appeal, whether or not the Double Jeopardy Clause bars appeal and the statutory construction of section 1954, are legal questions. As such, we are permitted to review them freely under the *de novo* standard of review. *United States* v. *McConney,* 728 F.2d 1195 (9th Cir.) (en banc), *cert. denied,* 105 S.Ct. 101 (1984).

A. *No. 84-1102*

Defendants Lane and Marolda were, in addition to officers of their respective locals, trustees of a total of six benefit plans: (1) Local 28 Oakland Welfare Fund; (2) Local 28 Oakland Pension Fund; (3) Local 28 Contra Costa Welfare Fund; (4) Local 28 Contra Costa Pension Fund; (5) Local 19 Welfare Fund; and (6) Local 19 Pension Fund.

Counts One through Twelve of the indictment alleged three common objectives of the scheme to defraud. The first objective was to deprive the two locals of the loyal and honest services of Lane and Marolda in the performance of their duties as officers. The second alleged objective was to deprive the six benefit plans of the loyal and honest services of Lane and Marolda in their roles as trustees. The third objective charged was to obtain money and property from the two locals and their respective benefit plans by false and fraudulent pretenses.

The defense moved pretrial to dismiss the indictment on grounds of duplicity and vagueness. The district court denied the motion, relying on *United States* v. *Mastelotto,* 717 F.2d 1238 (9th Cir. 1983). The court reasoned that the transaction alleged in the wire fraud counts were "within the conceivable contemplation of a greedy mind" and, therefore, could be viewed as one unitary scheme to defraud. The court went on to caution the government, however, that under *Mastelotto* it would be required to

prove the entire unitary scheme or, in other words, it must prove all three objectives as to each benefit plan and local as alleged in the indictment.

Subsequently, when the government finished its case-in-chief, the district court granted defendants' motion for judgment of acquittal, pursuant to Fed. R. Crim. P. 29. Citing *Mastelotto* and *United States* v. *Miller,* 715 F.2d 1360 (9th Cir. 1983), *modified,* 728 F.2d 1269 (1984), *rev'd,* ____U.S.____, 85 L.Ed.2d 99 (1985), the court ruled that there was a fatal variance because the government failed to present sufficient proof as to a number of the benefit plans as alleged in Counts One through Twelve, and, therefore, had not proven all of the objects of the unitary fraud scheme.[2] The government now appeals, arguing that the district court's actions amounted to a dismissal rather than acquittal, thereby allowing this appeal and eventually a new trial on a narrower indictment.

Appellate jurisdiction over government appeals in criminal cases is authorized by 18 U.S.C. § 3731, except when the Double Jeopardy Clause bars further prosecution. It is settled law under the Double Jeopardy Clause that "[a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed . . . ." *United States* v. *Scott,* 437 U.S. 82, 91, 57 L.Ed.2d 65, 74, 98 S.Ct. 2187 (1978) (footnote omitted). In determining whether an appeal is barred by the Clause, the Supreme Court has instructed that the label applied by the district court, whether "acquittal" or "dismissal," is not dispositive. "The trial judge's characterization of his own action cannot control the classification of the action." *Scott,* 437 U.S. at 96, 57 L.Ed.2d at 77. Thus, applying

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substance over form to a district court's judgment of acquittal, appeal is barred if the court "evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572, 51 L.Ed.2d 642, 651, 97 S.Ct. 1349 (1977).

The crucial inquiry before this court, therefore, is to determine whether the district court's judgment was a true acquittal as evidenced by a legal evaluation of the government's case. For its part, the government readily admits that certain parts of the indictment were specifically dismissed for lack of evidence, thereby amounting to an acquittal as to those parts. The government does not appeal those specific findings. The crux of the government's argument, however, is that despite the label of "acquittal" used by the court, the judgment on Counts One through Twelve was in fact partly "a dismissal" based on the ruling of law that there was an impermissible variance. The government opines, therefore, that it is not barred from appealing or seeking a retrial on the individual parts of the scheme which the district court did not specifically reject for lack of sufficient evidence.

In most cases, the government's argument would be well taken. This case, however, involved an indictment for wire fraud. As such, the district court correctly recognized *Mastelotto* and *Miller* as the governing circuit authority. Together, *Mastelotto* and *Miller* established a special framework for consideration of wire fraud indictments in this circuit. The rule of *Miller,* based on the Fifth Amendment's grand jury guarantee, was that a conviction could not stand where the trial proof showed a fraudulent scheme much narrower than, even though wholly included within, the scheme indicted by the grand jury. The reasoning was that a grand jury's willingness to indict someone for a broad wire fraud scheme does not establish that the same grand jury would have indicted the person for a substantially narrower scheme.

The district court recognized this peculiar rule and, from the beginning, exhibited an understanding of it as well as an intention to hold the government to its directive. The government was specifically warned before trial that it was required to comply. When the government did not comply, the court explained to the jury, in terms of the Ninth Circuit case law, why it was granting defendants' motion for acquittal. The court explained that in light of the lack of evidence on several elements of the broad scheme, "a reasonable juror could not find beyond reasonable doubt that the defendants had participated in a unitary scheme to defraud as charged in the indictment." Thereafter, the court entered an order granting judgment of acquittal.

The actions and words of the district court clearly show that it evaluated the government's evidence under the prevailing legal standards and determined that that evidence was legally insufficient to sustain a wire fraud conviction as indicted. This can only amount to an acquittal on all thirteen counts that went to trial.

Interestingly, the Supreme Court granted certiorari in *Miller* after the district court entered its judgment, and very recently issued a unanimous opinion reversing this circuit. ____U.S.____, 85 L.Ed.2d 99 (1985). Nevertheless, the reversal of *Miller* is inconsequential to this case. Inasmuch as we find the judgment below to be a true acquittal, the Double Jeopardy Clause bars appeal even if the district court based the acquittal on an erroneous interpretation of governing legal principles or upon legal principles which are themselves subsequently overturned. *Scott,* 437 U.S. at 98, 57 L.Ed.2d at 79; *Sanabria* v. *United States,* 437 U.S. 54, 64, 57 L.Ed.2d 43, 54, 98 S.Ct. 2170 (1978).

Consequently, because the district court's judgment was an acquittal, the appeal in No. 84-1102 is barred by the Double Jeopardy Clause and must be dismissed.

B. *No. 83-1276*

The government also appeals the district court's pretrial dismissal of Counts Thirteen and Fourteen of the indictment, which charged defendants with violating 18 U.S.C. § 1954. Section 1954 prohibits the offer, acceptance, or solicitation of "any fee, kickback, commission, gift, loan, money, or *thing of value* because of or with intent to influence the actions or duties of union benefit plan trustees (emphasis added). Counts Thirteen and Fourteen alleged that defendants Schwartz and Chapman agreed to give, and defendants Lane and Marolda agreed to receive, "assistance in arranging for the merger of Local 19 and Local 28, as well as other services," as a *thing of value* in exchange for influencing the actions of Lane and Marolda in their positions as benefit plan trustees.

Applying the rule of lenity, the district court held that the reference to *thing of value* in section 1954 cannot be read to encompass assistance in arranging the merger of two unions and "other services." Therefore, because the court decided the defendants' alleged actions were not criminalized by the statute, the two counts were dismissed and severed so that an immediate appeal could be taken.

The question of first impression left for this court to decide, therefore, is whether as a matter of law, the statutory scope of *thing of value* is broad enough to include the intangible of providing assistance in arranging a merger. In analyzing this question, the allegations of the indictment are presumed to be true. *United States* v. *Buckley,* 689 F.2d 893, 897 (9th Cir.), *cert. denied,* 103 S.Ct. 1778 (1983).

To determine the scope of section 1954, this court looks first to the language of the statute. If that language is unambiguous, and if Congress has not clearly expressed a contrary intent, we will regard that language as conclusive. *Russello* v. *United States,* 464 U.S. 16, ____, 78 L.Ed.2d 17, 20, 104 S.Ct. 296 (1983). Furthermore, when a term

such as *thing of value* has not been specifically defined in the statute, we will assume that the ordinary meaning of the words express the legislative purpose behind them. *Id.*

The defendants urge that *thing of value* should be limited to tangible things with ascertainable monetary value. Ordinarily, however, the measure of value is not limited to commercial or monetary worth. We have recognized a common, broader interpretation of value. In *United States* v. *Sheker,* we held that information can be a *thing of value*:

> For instance, state secrets might trade hands without cash consideration. Information obtained for political advantage might have value apart from its worth in dollars. In each case the information sought would have value to others, in addition to the seeker.

618 F.2d 607, 609 (9th Cir. 1980) (holding information regarding the whereabouts of a witness was a *thing of value* under 18 U.S.C. § 912). Indeed, that value commonly extends in scope to include intangibles has been the conclusion of various courts when faced with the task of construing criminal statutes that contain the term *thing of value.*

In *United States* v. *Croft,* 750 F.2d 1354 (7th Cir. 1984), the defendant was convicted of converting to his own use a *thing of value* of the government, in violation of 18 U.S.C. § 641. The *thing of value* at issue was the labor of a government employee, whose research work product was appropriated by the defendant for private gain. The Seventh Circuit squarely held that intangible services do constitute a *thing of value.* 750 F.2d at 1361-1362.

The Second Circuit in *United States* v. *Girard,* 601 F.2d 69 (2d Cir.), *cert. denied,* 444 U.S. 871 (1979), held that the sale of information is a *thing of value,* reasoning that "[t]hese words are found in so many criminal statutes throughout the United States that they have in a sense become words of art. The word 'thing' notwithstanding,

the phrase is generally construed to cover intangibles as well as tangibles." 601 F.2d at 71. The *Girard* opinion reviews some of the intangibles which have been held to be *things of value*, including amusement, sexual intercourse or the promise of sexual intercourse, the promise to reinstate an employee, and an agreement not to run in a primary election. *Id.* Furthermore, the testimony of a witness has been held to be a *thing of value*. *United States* v. *Zouras,* 497 F.2d 1115, 1121 (7th Cir. 1974) (construing 18 U.S.C. § 876, which prohibits extortion of "money or other thing of value"). And, in a very broad construction, *thing of value* has been applied to commercially worthless stock which a defendant "believed" had value for himself. *United States* v. *Williams,* 705 F.2d 603, 623 (2d Cir.), *cert. denied,* 104 S.Ct. 524 (1983) (construing bribery statutes, 18 U.S.C. §§ 210(c), 201(g)).

It is clear then, that in the ordinary sense *thing of value* is not limited in meaning to tangible things with an identifiable commercial price tag. The defendants, however, argue that the ordinary interpretation is not applicable to section 1954 because of "crucial differences" between the statutory structure and legislative intent of section 1954 and other statutes. Defendants posit that the scope of *thing of value* is narrowed in section 1954 to include only tangibles with ascertainable value because the phrase is preceded by the terms "fee, kickback, commission, gift, loan, [and] money." We are not persuaded.

The legislative history of section 1954 indicates that the enumeration of terms preceding *thing of value* was intended as inclusory, rather than limiting, language. The initial House version of the statute contained "money or other thing of value" as the only description of prohibited items. *See* Conf. Rep. No. 1417, 87th Cong., 1st Sess. 13 (1962). Concerns were subsequently raised about the need to ensure that forms of improper influence less blatant than direct money payments would be covered by the

statute. These concerns were raised, in part, because of the Department of Justice's experience in enforcing the *thing of value* provision of Section 302 of the Taft-Hartley Act (29 U.S.C. § 186). S. Rep. No. 908, 87th Cong., 1st Sess. 13-14 (1961). In response to these concerns, the House version was amended to expressly include the additional terms. Conf. Rep. No. 1417, 87th Cong., 1st Sess. 13 (1962).

Nothing in the legislative history of section 1954 suggests that Congress intended *thing of value* to be construed more narrowly than in other statutes employing the phrase. Congress was concerned with violations of trust and fiduciary duties by union fund trustees. *See United States* v. *Romano,* 684 F.2d 1057, 1063 (2d Cir.), *cert. denied,* 103 S.Ct. 375 (1982). A violation of trust which is influenced by the offer of an intangible service is no less damaging to trust fund beneficiaries than if the influence was in the form of a cash kickback. The significant factor is that the trustee sufficiently valued the thing offered to compromise his integrity and position. We do not, therefore, find the language of section 1954 to be ambiguous. The very words and purpose of the statute show that Congress clearly intended the scope of *thing of value* to include intangibles such as are alleged in the instant indictment. As Justice Homes said, " ' . . . there is no canon against using common sense in construing laws as saying what they obviously mean.' " *Croft,* 750 F.2d at 1362 (*quoting Roschen* v. *Ward,* 279 U.S. 337, 339, 73 L.Ed. 722, 728, 49 S.Ct. 336 (1929)).[3]

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[3] Although not cited to us by any party, we are mindful of this court's decision in *Chappell* v. *United States,* 270 F.2d 274 (9th Cir. 1959), which held that appropriating the services of another does not constitute a *thing of value* under 18 U.S.C. § 641. That decision has been criticized as a "limited, narrow, and unrealistic interpretation." *Croft,* 750 F.2d at 1362. Moreover, this court has not cited *Chappell* in support of its limited interpretation of *thing of value* since that case

Because we find the statute to be unambiguous in this situation, we have no reason to apply the rule of lenity. That rule only comes into play at the end of the statutory construction process in situations where the language of the statute is not clear. We find that the district court erred in reading section 1954 as ambiguous, and also erred in applying the rule of lenity.

As a result, we must remand No. 83-1276 to the district court. Our earlier holding that the Double Jeopardy Clause bars appeal in No. 84-1102 does not affect the appeal in No. 83-1276. This is for the obvious reason that the subject counts of No. 83-1276 were dismissed prior to trial, and, therefore, the defendants have not yet been placed in jeopardy, Nevertheless, those counts are affected by the collateral estoppel doctrine.

United States v. *Hernandez,* 572 F.2d 218, 220 (9th Cir. 1978), sets out the three-step inquiry this court follows for collateral estoppel analysis in criminal cases. First, the issues in the two actions are identified so that we may determine whether they are sufficiently similar and material to justify invoking the doctrine. Second, we examine the first record to determine whether the issue was fully litigated. Finally, from our examination of the record, we ascertain whether the issue was necessarily decided.

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was decided in 1959. Rather, in the few situations presented to us, we have tended clearly toward a broader scope of *thing of value*, to include intangibles. *See, e.g., Sheker,* 618 F.2d at 609 (holding information can be a *thing of value*); *United States* v. *Friedman,* 445 F.2d 1076 (9th Cir.), *cert. denied,* 404 U.S. 958 (1971) (implicitly holding that government information is a *thing of value* under 18 U.S.C. § 641); *Whaley* v. *United States,* 324 F. 2d 356 (9th Cir. 1963) (implicitly holding that information can be a *thing of value*).

Finally, the legislative history we have cited concerning the scope of *thing of value* is at odds with the decision in *Chappell.* Under these circumstances, the validity of the *Chappell* holding as binding authority in this circuit is seriously undermined. Because of this subsequent history, we believe we are correct in rejecting *Chappell.*

Applying this analysis, it is initially most obvious that the allegations underlying Counts One through Twelve and Counts Thirteen and Fourteen establish that the trial of Counts One through Twelve involved factual issues substantially similar to those posed by Counts Thirteen and Fourteen. The benefit plan corruption alleged in Counts Thirteen and Fourteen was, after all, part of the overall scheme to defraud alleged in Counts One through Twelve.

Second, it is equally obvious that the government did fully litigate the issues involved in Counts One through Twelve at trial. As noted above, the district court warned the government it would have to prove all components of the unitary scheme to defraud as alleged in the indictment. This strict requirement of proof required the government to fully litigate all the alleged objectives and false pretenses of the scheme at issue in Counts One through Twelve, including those involved in the benefit plan corruption at issue in Counts Thirteen and Fourteen.

Third, the district court specifically found that proof of the alleged fraudulent objectives with respect to four benefit plans—both Local 19 plans and both Local 28 Contra Costa plans—was insufficient: "There just isn't any evidence that Lane and Marolda and Schwartz conspired to deprive those plans of the services of Lane and Marolda as trustees." These specific findings appear to be the only similar issues which were necessarily decided by the district court in granting the judgment of acquittal. Therefore, under the *Hernadez* inquiry, relitigation of these issues as against defendants is barred by the collateral estoppel doctrine. The allegations concerning the defendants' corrupt activities involving the two Oakland Benefit Plans of Local 28 remain as triable issues.

III. CONCLUSION

For the reasons expressed herein, the appeal in No. 84-1102 is barred by the Double Jeopardy Clause and is hereby DISMISSED. The district court's pretrial dismissal of two counts, challenged in No. 83-1276, is REVERSED and REMANDED for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. CR-83-0008-WHO

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ALLEN M. DORFMAN, ET AL., DEFENDANTS.,

ORDER GRANTING JUDGMENT OF ACQUITTAL

Defendants Schwartz, Lane and Marolda have moved for judgment of acquittal under Rule 29(a), Federal Rules of Criminal Procedure.

After consideration of the written briefs and oral arguments of all parties, the Court finds that the government has not presented sufficient proof as to a number of the benefit plans as alleged in Counts 1-12. Accordingly, because the government has not proven all of the objects of the fraud scheme, there is a fatal variance. *United States* v. *Mastelotto,* 717 F.2d 1238, 1250 (9th Cir. 1983); *United States* v. *Miller,* 715 F.2d 1360, 1363 (9th Cir. 1983[])].

IT IS THEREFORE ORDERED THAT, the motion of acquittal is granted as to Counts 1-12. IT IS FURTHER ORDERED THAT, the motion for judgment of acquittal as to Count 13 on the grounds of lack of sufficient evidence is also granted.

DATED: 3/26/84

/s/ WILLIAM H. ORRICK
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. CR-83-0008-WHO

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ALLEN M. DORFMAN, SOL C. SCHWARTZ, RAYMOND F. LANE, ABE CHAPMAN, FRANK C. MAROLDA, DEFENDANTS.

Before: The Honorable William H. Orrick, Judge

REPORTERS' TRANSCRIPT

Wednesday, March 7, 1984

REPORTED BY: CARL R. PLINE, C.S.R.
VIVIAN A. PELLA, C.S.R.

Appearances:

FOR THE PLAINTIFF:

JOSEPH P. RUSSONIELLO, ESQUIRE
United States Attorney

By: SANFORD SVETCOV, ESQUIRE
WILLIAM R. MARTIN, ESQUIRE
Special Attorneys
UNITED STATES DEPARTMENT OF JUSTICE
450 Golden Gate Avenue
San Francisco, California 94102

For Defendant Schwartz:

JAMES J. BROSHAHAN, ESQUIRE
KAREN LEIGH SNELL, ESQUIRE
MORRISON & FOERSTER
One Market Plaza
Spear Street Tower
San Francisco, California 94105

For Defendant Lane:

JAMES F. HEWITT, ESQUIRE
Federal Public Defender
By: A. J. KRAMER, ESQUIRE
Assistant Federal Public Defender
450 Golden Gate Avenue
San Francisco, California 94102

For Defendant Marolda:

ALLEN RUBY, ESQUIRE
MORGAN, RUBY, TETER, SCHOFIELD,
FRANICH & FREDKIN
100 Park Center Plaza, Suite 550
San Jose, California 95113

Wednesday, March 7, 1984 9:33 o'clock a.m.

(The following proceedings outside the presence of the jury.)

The Court: Good Morning, Counsel.

Mr. Brosnahan: Good Morning, Your Honor.

Mr. Martin: Good Morning, Your Honor.

The Court: I have reviewed again practically everything I've got on this case. And I've reviewed the—reread the cases, including the new ones cited yesterday afternoon, and including the one cited by the government this morning.

And I feel . . . compelled to take this drastic action, but I think it's my duty to do it. And I grant the motions for judgment of acquittal, and order the entry of judgment of acquittal.

I'm going to have the jury in so they can listen to—understand the reasons for this.

Mr. Clerk, get the jury, please.

The Clerk: All rise for the jury.

(Jury entering courtroom at 9:34 A.M.)

The Court: All right. You may be seated.

Ladies and Gentlemen of the jury, we welcome you back.

During the weekend, and at the close of the government's case, the defense counsel—counsel for both sides, and the court I might add, have not been idle. Because under our criminal system, and under the criminal rules, at the end of the government's case the defendants may make a motion for judgment of acquittal. And the court is dutybound to enter that judgment of acquittal if the court finds that no reasonable juror could find that the evidence put on by the government had in fact proved the case set forth in the indictment.

The papers were, as everything has been on both sides in this case, excellent.

And yesterday afternoon I listened to argument for about three and a half hours. And I have concluded, for the reasons which I'm about to tell you, that—I felt compelled, and I have, entered a judgment of acquittal.

Now, the standard in the Ninth Circuit for deciding whether to grant a motion for acquittal is whether, viewing the evidence presented in the light that's most favorable to the government, a reasonable jury could find from relevant and admissible evidence that the accused was guilty beyond a reasonable doubt of each element of the crime charged.

Now, in this case count one of the indictment charges all of the defendants with violation of 18 United States Code, Section 371, which is a conspiracy. And paragraph one describes the offense as a conspiracy to violate 18 United States Code, Section 1343, or to commit wire fraud.

And counts two through twelve of the indictment charges all defendants with separate violations of 18 United States Code, Section 1343.

Paragraph two of that count defines the scheme to defraud that is the basis of the wire fraud, and is essentially identical to paragraph nine of count one which describes the objects of the conspiracy.

Now, there are three components of the alleged wire fraud scheme and three objectives of the alleged conspiracy. The first—and it's clear, as you can look at your indictment—is to defraud and deprive Locals 19 and 28 and their members of their right to the loyal, faithful, and honest services of Raymond F. Lane and Frank C. Marolda in the performance of their duties as officers of the union.

Now, just so you fully understand this: to defraud and deprive both Locals, Locals 19 and 28, and their members of the loyal and faithful services of Lane and Marolda in the performance of their duties as officers of the union.

And then the second component, which the government had to prove, was the conspiracy to defraud and deprive the employee benefit plans of Locals 19 and 28 of their right to the loyal, honest, and faithful services of Raymond F. Lane and Frank C. Marolda in the performance of their duties as trustees of the plan.

And then the third component that the government had to prove was the conspiracy to obtain money and property from Locals 19 and 28, and their respective employee benefit plans, by false and fraudulent pretenses, representations, and promises.

Now, our attention, specific attention, was first drawn to those sections of the indictment by the defendants' motion to dismiss the indictment on the grounds of duplicity and vagueness. And those motions were made about six months ago. They again were well briefed and well argued. And I denied the motions, because the Ninth Circuit in a

case called United States against Mastelotto held that the central question in a duplicity review of any given count in an indictment in a mail or wire fraud case is whether it falls within one unitary scheme to defraud.

And the court there reasoned that a defendant cannot be convicted of a count which—charging him with participation in fraudulent scheme y, where the Grand Jury indicted based on his participation in a fraudulent scheme x, even if the schemes themselves overlap and are concentric.

And that's a most salutary rule in our country; that you can't be—if you're going to be charged with a crime, and subjected to the possible punishment, you should know precisely what the crime is; and the prosecutor should prove that crime. He can't go hunting around for another crime, even though you may be guilty of another crime.

And since the grand jury cannot be assumed to have indicted based on the defendants' participation in the overlapping or the common portions of the schemes, why the petit jury, and that's you, would be instructed to find the defendant to have participated in the overall scheme alleged by the grand jury. And that is necessary in any mail or any fraud case.

Now, I relied on that case, which is the law in this circuit, and the holding that: If the set of transactions alleged in a count is within the conceivable contemplation of a greedy mind, no duplicity has occurred.

And so on that ground I denied the defendants' motion to dismiss. But I made a point to caution the government that it would have to prove the entire unitary scheme, that is to say, you would have to prove each component of the three parts of the wire fraud which are alleged in counts II through XII and from the substantive basis for count number I.

Now, it is —I can call your attention to the—I see some of you looking at the indictments to the objects, it's on page 4 of the indictment, paragraph 9. But there were

several gaping areas, and I'm not going into more because if the government fails just to prove one, it's a fatal variance. But I'm going to mention three.

The defendants were charged that they had the intention of defrauding by depriving the benefit plans of the services of Lane and Marolda as trustees.

Now, there were six of these benefit plans. And there's practically no evidence with respect to what the Local 19 Benefit Plans were let alone what the Contra Costa Benefit Plan of Local 26 [*sic*]. There just isn't any evidence that Lane and Marolda and Schwartz conspired to deprive those plans of the services of Lane and Marolda as trustees.

There is practically no evidence with respect to Marolda as a trustee. The indictment charged that there was a conspiracy to obtain money and property from the locals and their benefit plans by false and fraudulent pretenses. There is absolutely no evidence about obtaining money or property from the Local 19 benefit plans.

And the problems that the court has had in reviewing the evidence in light of the indictment is to see precisely what evidence there was, evidence most favorable to the government that they defrauded and deprived Locals 19 and 28 and their members of their right to the loyal, faithful and honest services of Lane and Marolda and the performance of their duties as officers of the union, and they were charged with defrauding and depriving the employee benefit plans of Locals 19 and 28 of their right to the loyal, honest and faithful services of Lane and Marolda in the performance of their duties as trustees of the plan.

And they're charged with obtaining money and property from Locals 19 and 28 and their respective employee benefit plans by false and fraudulent pretenses, representations and promises.

So it is the opinion of this court that in the light of the evidence a reasonable juror could not find beyond reasonable doubt that the defendants had participated in a

unitary scheme to defraud as charged in the indictment.

And based on the evidence that was presented in connection with count number XIII which was the conspriacy to embezzle from Local 19, that count alleged that Lane and Marolda conspired to embezzle funds from Local 19 in violation of 18 United States Code Section 371. And the government's theory was that Lane and Marolda plotted to pass a deceptive resolution by the Executive Board of Local 19 which was Marolda's union that would grant Marolda a salary for life should he leave Local 19 for any reason. And the executive board of Local 19 passed such a resolution.

The government presented evidence that Lane and Marolda did discuss the language to be used in the resolution, and they discussed how Marolda should introduce it to the executive board. And it's clear from their conversations that Lane and Marolda sought to protect Marolda's self-interest in the event that he should be forced to leave the union. But their motives and shabby as they are, and both of these men have been convicted of embezzling, and they're just not admirable characters, but they're citizens of the United States and are entitled to be protected by the law.

And there's nothing in the law that would transmute their shabby, greedy, selfish motives evidenced by the resolution into a conspiracy to embezzle, and nothing about the language or the resolution is deceptive or ambiguous. It's quite clear. And it purports to give and would have given Marolda a salary for life if he left the union for any reason.

And the resolution is prefaced by a statement of the board's intent in passing it, namely, to reward Marolda's faithful service to the union.

There was no evidence presented that the executive board did not actually enforce that purpose or that they were coerced into approving the resolution.

And the fact that Marolda sponsored the resolution for his own purposes and he and Lane conspired like schoolboys urging another fellow to make the motion and so on is not relevant of where [*sic*] the action amounted to embezzlement.

There's also no evidence beyond Marolda's boasting that the entire executive board of Local 19 was entirely under his control.

There can of course be no conspiracy to embezzle if the plan, when it was accomplished, would not be an embezzlement.

Section 501(c) of Title 29 United States Code essentially transmutes common law embezzlement into a federal crime when the acts are by a union official or an employee and the victim is a union.

And common law larceny is the fraudulent conversion of the property of another by one who is in lawful possession of the same. And had Marolda left Local 19 and had he then been paid under the resolution, those payments could not be embezzlement. Payment of the salary would have been a voluntary act by the union. The money belonging to the union would not have been in Marolda's possession before it was paid to him. And it is clear that any payments were intended by the union to be used by him for his personal needs.

And under those facts Marolda could not have fraudulently converted the union's property to his own use, and the only fraud that was present in the evidence presented by the government is moral fraud, if you will, illustrated by Marolda's discussions with Lane concerning the resolution.

And so it's my judgment that on that evidence a reasonable jury cannot find Lane or Marolda guilty beyond a reasonable doubt of each element of the crime charged. And accordingly, I am ordering a judgment of acquittal entered in that respect.

I want you to remember as I often remind juries that the government never wins or loses. The government never loses, the government always wins when justice is done. And I think as I've told counsel before and as I've mentioned it to you before, that we've been in this trial exceedingly for the nature [*sic*] as having as able trial counsel on both sides, it's been my privilege to see for a good long time. And the case I think was fairly and well tried.

And now as I excuse you I want to thank you for your agreement to carry out your most important obligation which I mentioned at the start of this trial in serving as a juror in this case. Trial by jury is the most important cornerstone of the Anglo-Saxon common law. And we took it from England in 17—well, before that, in 1620.

Trial by jury was the law when the first settlers came ashore. And every territory had a trial by jury. And in the—in a convention in New York in 1665 the Colonies declared that they wanted to each have trial by jury in their charters. And in the constitutional convention in 1787 it was set in concrete in article III of the constitution, article VII and it's the most valuable right that citizens have.

A jury is the only buffer between the people and the government. And it's alive and well in the United States today, thanks to conscientious citizens like yourselves.

And I want to thank you, and I'm sure counsel do—and I do it on behalf of counsel—for your taking the time to serve.

And when you leave, would you please leave your—the notebooks in the jury room, along with the badges.

All right. The court stands adjourned.

The clerk: All rise, Please.

(Whereupon, these proceedings were concluded at 9:55 a.m.)

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ORIGINAL

Supreme Court, U.S.
FILED
JUL 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

NO. 85-2031

UNITED STATES OF AMERICA,

PETITIONER,

V.

SOL C. SCHWARTZ AND RAYMOND F. LANE,

RESPONDENTS.

BRIEF OF RESPONDENT IN OPPOSITION TO GOVERNMENT'S PETITION FOR WRIT OF CERTIORARI

JAMES F. HEWITT
Federal Public Defender,
450 Golden Gate Avenue
San Francisco, California 94102
Counsel for Respondent Lane

BRIEF OF RESPONDENT IN OPPOSITION TO GOVERNMENT'S PETITION FOR CERTIORARI

STATEMENT OF FACTS

The procedual posture of the case and the alleged facts are accurately set out in the opinion of the court below. Petition, Appendix A, p. 1a. The government fails to mention that the district court specifically found the government had completely failed to prove almost all its allegations.[1] However, because most of the government's factual references are not germane to the government's petition in light of the district court's ruling, it is not felt necessary to dispute their accuracy.[2] The opinion below of the court of appeals sets forth those facts necessary to resolution of the issue presented by the government's petition.

DISCUSSION

The government's petition, rather than presenting an important question not previously decided by this Court, presents an issue clearly covered by this Court's prior rulings that the Double Jeopardy Clause prohibits a government appeal after an acquittal of a defendant.[3] The decision of the court of appeals

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[1] As just one example, at page 4 of its Petition, the government claims that Lane and Marolda agreed to reopen the bidding on contracts to administer their locals' benefit plans and to rig that bidding. Yet the district court found "There is absolutely no evidence about obtaining money or property from the Local 19 benefit plans." Petition, Appendix A, p. 36a.

[2] The district court pointed out that there were "several gaping areas" in the government's proof, and that while the district court could point out more, it was just going to point to three of those failures of proof. Petition, Appendix A, p 36a. In fact, the district court never found that the government had proved any of its allegations. The district court only specifically pointed out some of the government's failures, not all.

[3] Respondent Lane also joins in all the arguments set forth in Respondent Schwartz's memorandum in opposition to the petition for certiorari. The position of both respondents is identical.

in this case follows the holdings of this Court and not only is not in conflict with the holding in United States v. Maker, 751 F.2d 614 (3d Cir. 1984), cert. denied, 105 S.Ct. 3479 (1985), but is consistent with Maker.

This Court has recently restated its well-established rule that under the Double Jeopardy Clause the government may not appeal from a judgment of acquittal based on a ruling by the trial judge that the evidence is insufficient to establish a defendant's factual guilt. Smalis v. Pennsylvania, 106 S.Ct. 1745, 1748 (1986). An appeal is not barred, however, where the ruling is based on a ground not related to factual guilt or innocence. United States v. Scott, 437 u.S. 82, 99 (1978). In the present case the district court specifically stated when granting the judgment of acquittal that "it is the opinion of this Court that in the light of the evidence a reasonable juror could not find beyond a reasonable doubt that the defendants had participated in a unitary scheme to defraud as charged in the indictment." Petition, Appendix A, p. 36a-37a.[4]

The government's argument is that the courts below did not identify any element of the offense of mail fraud that the government did not prove. That argument is frivolous. Both the district court and the court of appeals found that the government had failed to prove the alleged scheme to defraud.

Prior to the trial the respondents had moved to dismiss each count of the indictment on grounds of multiplicity. The

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[4] While respondent recognizes that the trial court's characterization of its action does not control for double jeopardy purposes, United States v. Scott, 437 U.S. at 96, the district court's statement clearly showed that it was making a factual determination.

government assured the district court that it would prove a unitary scheme to defraud. The district court found the indictment charged a single scheme to defraud but warned the government that under United States v. Mastelotto, 717 F.2d 1238 (9th Cir. 1983) and United States v. Miller, 715 F.2d 1360 (9th Cir. 1983), modified, 728 F.2d 1269 (1984), rev'd 105 S.Ct. 1811 (1985), the government would have to prove the unitary scheme to defraud. At the time of the trial Mastelotto and Miller governed multiple-object fraud cases in the Ninth Circuit.

The district court found the government did not prove the scheme to defraud. The scheme to defraud is clearly the most important element of wire fraud. The court of appeals found that:

> The actions and words of the district court clearly show that it evaluated the government's evidence under the prevailing legal standards and determined that that evidence was legally insufficient to sustain a wire fraud conviction as indicted. This can only amount to an acquittal on all thirteen courts that went to trial.

Petition, Appendix A, p. 7a. The court of appeals agreed that the district court found a failure of proof on the essential element of the scheme to defraud.

The government contends that the district court did not find the proof insufficient as to two of the benefit plans.[5] The government does concede, as it must, that the district court found the evidence insufficient with respect to the other four benefit plans, and thus that the government did not prove the scheme to defraud. The district court's finding of

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[5] It must be emphasized that the district court did not find that there was sufficient evidence to go to the jury regarding these two benefit plans. The district court was silent on that issue, indicating that it was pointing out only some of the gaping holes in the government's proof.

this failure was a finding of failure to prove the single scheme to defraud, the most important element of the offense.

This Court's later reversal of Miller is irrelevant to the double jeopardy analysis, as the court of appeals recognized.[6] In Smalis v. Pennsylvania, 106 S.Ct. at 1748 n.7, the state argued that the trial court in finding the evidence insufficient, erred in determining the degree of recklessness necessary for conviction. This Court reiterated the rule that:

> "[T]he fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles'... affects the accuracy of that determination but it does not alter its essential character." United States v. Scott, 437 U.S. at 98, 98 S.Ct., at 2197 (quoting id., at 106, 98 S.Ct., at 2201 (Brennan, J., dissenting)). Accord, Sanabria supra; Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164(1984).

Smalis v. Pennsylvania, 106 S.Ct. at 1748 n.7. The district court's determination of the proof necessary to show a scheme to defraud in the present case is indistinguishable from the determination of the degree of recklessness made by the trial court in Smalis.

The present case is very similar to Sanabria v. United States, 437 U.S. 54 (1978). In Sanabria, the defendant was charged in a single count with conducting an illegal gambling business, involving horse wagering and numbers betting. The government presented no evidence of the defendant's involvement in the horse wagering and the trial court excluded

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[6] The reversal of Miller assures that these circumstances will not arise again. Thus, the government's petition does not present an important issue that will recur.

evidence of the numbers betting. The trial court then acquitted the defendant on the overall charge.

This Court assumed that the trial court erred in excluding evidence of the numbers betting, yet held that the government could not appeal the suppression order or the judgment of acquittal. The Court stated that:

> Legal consequences ordinarily flow from what actually happened, not from what a party might have done from the vantage of hindsight. The precise manner in which an indictment is drawn cannot be ignored, because an important function of the indictment is to ensure that, "in case any other proceedings are taken against [the defendant] for a similar offence, . . . the record [will] show with accuracy to what extent he may plead a former acquittal or conviction."
>
> With regard to the one count that was in fact charged, as to which petitioner has been at least formally acquitted, we are not persuaded that it is correct to characterize the trial court's action as a "dismissal" of a discrete portion of the count. While form is not to be exalted over substance in determining the double jeopardy consequences of a ruling terminating a prosecution, neither is it appropriate entirely to ignore the form of order entered by the trial court. Here the District Court issued only two orders, one excluding certain evidence and the other entering a judgment of acquittal on the single count charged. No language in the indictment was ordered to be stricken, nor was the indictment amended. The judgment of acquittal was entered on the entire count and found petitioner not guilty of the crime of violating 18 U.S.C. § 1955.

437 U.S. at 65-67 (citations and footnotes omitted). The Court concluded that the double jeopardy clause barred reprosecution of any aspect of the charges, including the numbers betting allegations. The Court further stated, "[t]hat judgment of acquittal, however erroneous, bars further

prosecution of any aspect of the count and hence bars appellate review of the trial court's error." Id. at 69.

In the present case, the government presented all its evidence, which the district court examined and found insufficient. The district court acquitted respondents on each count in which they were charged with the overall scheme. Clearly the district court, in finding the evidence of the overall scheme insufficient, made a finding identical to that of the district court in Sanabria. The government's attempt to distinguish Sanabria in its petition fails. The district court found a failure to prove the scheme charged, and acquitted respondents in every sense of the word. Once the district court found the evidence insufficient, this appeal was barred by the Double Jeopardy Clause. See Justices of Boston Municipal Court v. Lydon, 104 S.Ct. 1805, 1812-1814 (1984).

The government also cites in its petition United States v. Scott, 437 U.S. 82 (1978), and Lee v. United States, 432 U.S. 23 (1977). Neither is apposite to this case. In Scott, the Court permitted a government appeal when the trial was terminated due to excessive preindictment delay. In Lee, the government was allowed to appeal an order dismissing the indictment for failure to state an element of the offense. Both those cases involve legal dismissals for defects in the indictment. In the present case the district court acquitted respondents after the government failed to prove the charges, not for a defect in the indictment.[7]

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[7] Indeed, the district court had upheld the propriety of the indictment, in the face of respondents' pretrial challenges to

The decision of the court of appeals in this case in no way conflicts with United States v. Maker, 751 F.2d 614 (3d Cir. 1984), cert. denied, 105 S.Ct. 3479 (1985), contrary to the government's assertion. In Maker, the defendants were charged with one mail fraud scheme involving insurance claims arising out of two auto accidents. The district court, after hearing the opening statements and the testimony of one government witness, dismissed the indictment on the grounds that the government would not be able to show that the entire scheme of both accidents was planned in advance. The court of appeals held the government's appeal was not barred by the Double Jeopardy Clause because the district court was incorrect in determining that advance planning was an element of the offense, and that this erroneous legal ruling had not resolved any factual element in the defendant's favor. The district court in Maker had "dismissed the indictment on the motion of Maker, but denied Maker's motion for a judgment of acquittal." 751 F.2d at 619-620. The court of appeals noted that had the case proceeded farther than opening statements and the first witness it might have found that the district court's decision was fact-based. 751 F.2d at 622 n.18.

Thus, Maker is not in conflict at all with the present case. The district court in the present case, only after hearing the government's entire case, granted a judgment of acquittal. This judgment was fact-based on the government's failure to prove the scheme to defraud. As the court of appeals stated:

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it. It was not the indictment that was found wanting, but rather the government's factual proof.

> The actions and words of the district court clearly show that it evaluated the government's evidence under the prevailing legal standards and determined that that evidence was legally insufficient to sustain a wire fraud conviction as indicted. This can only amount to an acquittal on all thirteen counts that went to trial.

Petition, Appendix A, p. 7a.

CONCLUSION

The court of appeals correctly applied the well-established standards of this Court. The decision is not in conflict with any other case. This issue is unlikely to arise again, given this Court's reversal of Miller. The petition for a writ of certiorari should therefore be denied.

DATED: July 16, 1986

Respectfully submitted,

JAMES E. HEWITT
Federal Public Defender

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

NO. 85-2031

UNITED STATES OF AMERICA,

PETITIONER,

V.

SOL C. SCHWARTZ AND RAYMOND F. LANE,

RESPONDENTS.

AFFIDAVIT OF MAILING

James F. Hewitt, a member of the bar of this Court, certifies that pursuant to Rule 28 of this Court, he filed and served the within Brief of Respondent in Opposition to Government's Petition for Writ of Certiorari with the Clerk of this Court and on counsel for petitioner, respectively, by depositing said memorandum, and copies thereof, in the United States Mails at San Francisco, California, on July 17, 1985, first class, postage pre-paid within the time allowed for filing, the Petition having been received by respondent on June 19, 1986.

Service was made upon counsel for petitioner at the following address:

Honorable Charles Fried
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

All other parties required to be served here have been served.

JAMES F. HEWITT
Federal Public Defender

Counsel for Respondent LANE

Subscribed and sworn to before me
on this 17th day of July, 1985

Martha Sandham
Deputy Clerk, United States District Court

(8)

Supreme Court, U.S.
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JUL 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2031

In The
Supreme Court of the United States
October Term, 1985

UNITED STATES OF AMERICA,

Petitioner,

v.

SOL C. SCHWARTZ and RAYMOND F. LANE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT SOL C. SCHWARTZ IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAMES J. BROSNAHAN*
JACK W. LONDEN
KAREN SNELL
MORRISON & FOERSTER
California Center
345 California Street
San Francisco, CA 94104
(415) 434-7000

Attorneys for Respondent Sol C. Schwartz

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 228-8845 (tone) 75
or call collect (402) 342-2831

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QUESTION PRESENTED

Whether the Double Jeopardy Clause prohibits a government appeal of a judgment of acquittal based on the district court's determination that the government failed to prove certain factual averments in the indictment which were required under the Ninth Circuit's then-existing decisions to be proved to sustain a conviction of the offenses charged.

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COUNTERSTATEMENT OF THE CASE

The trial in this action ended on March 7, 1984, when at the close of the government's case, the district court granted respondents' motion for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. Respondents argued that the government had failed to prove a long list of facts essential to prove the scheme to defraud alleged in the indictment, thus resulting in an absence of proof necessary to convict the defendants of the offenses charged. C.A. App. at 45-79. The district court based its judgment of acquittal on the then-existing law of the Ninth Circuit, which precluded a conviction for wire fraud if the proof at trial showed a scheme to defraud that did not include all parts alleged in the indictment. *United States v. Mastelotto,* 717 F.2d 1238 (9th Cir. 1983); *United States v. Miller,* 715 F.2d 1360 (9th Cir. 1983), *modified,* 728 F.2d 1269 (1984), later *reversed,* — U.S. —, 105 S. Ct. 1811 (1985).[1] The district court found "several gaping areas" of unproved facts essential to a conviction. App. to Petition for Certiorari at 36a. Stating that it was unnecessary to mention more of the defects in the government's proof, the district court specifically stated that the government had failed to produce evidence from which the jury could find that respondents intended to defraud four of the six union benefit plans that were included in the indictment. *Id.*

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[1] In a pretrial motion, respondents had moved to dismiss the indictment because it charged them with acts that did not constitute a unitary "scheme." C.A. App. at 15-23. Relying on *United States v. Mastelotto,* the district court denied this motion but instructed the government that it would be required to prove at trial each part of the scheme as alleged. App. to Petition at 35a.

The government appealed pursuant to 17 U.S.C. 3731.[2] The court of appeals granted respondents' motion to dismiss the appeal on the ground that it was barred by the Double Jeopardy Clause. The court held that the district court had "acquitted" the defendants under the then-applicable law of the Ninth Circuit as to wire fraud, reflected in its decisions in *United States v. Miller* and *United States v. Mastelotto*. The court of appeals held that the district court had correctly applied these precedents in ruling that the government's proof was legally insufficient to sustain a conviction. The government petitioned for rehearing. The court of appeals denied rehearing on the double jeopardy issue.

The government argued below that the district court's decision was appealable as an erroneous dismissal of the indictment. The district court's action was not an acquittal, the government claimed, because the court did not find that the government had failed to prove any of the essential statutory elements of the offense of wire fraud. Addressing the court of appeals, the government argued that the district court misapplied the holdings of *Miller* and *Mastelotto*—an argument not presented to this Court. In the alternative, the government argued that *Miller* and *Mastelotto* were wrongly decided. Under this Court's decision in *United States v. Miller*, announced over a year after the judgment of acquittal in the instant case, failure to prove parts of a scheme to defraud would no

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[2] Recognizing that the district court had found the government's evidence insufficient, the government stated that it did not appeal "the findings of insufficient evidence as to the Local 19 benefit plans, the Local 28 Contra Costa plans, or Marolda as a trustee of the Local 19 plans." C.A. App. at 166.

longer preclude a conviction for wire fraud if the government proved a narrower scheme than was included in the indictment.

The government seeks to obtain a reversal of the judgment of acquittal and to subject respondents to a second trial on the parts of the original charges for which the district court made no explicit finding of insufficient evidence.

REASONS FOR DENYING THE PETITION

I. BECAUSE THE DISTRICT COURT ASSESSED THE EVIDENCE AND FOUND IT INSUFFICIENT FOR A CONVICTION, ITS ACTION WAS AN ACQUITTAL, REGARDLESS OF THE GOVERNMENT'S CONTENTION THAT THE DISTRICT COURT ERRED.

The protection against double jeopardy attaches when the action of the trial court was an "acquittal." *United States v. Scott*, 437 U.S. 82, 91 (1978). As the government has stressed, an acquittal occurs when there has been "a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). Moreover, "'the category of acquittals includes 'judgment[s] . . . by the court that the evidence is insufficient to convict.'" *Smalis v. Pennsylvania*, — U.S. —, 106 S.Ct. 1745, 1748 (1986) (quoting *United States v. Scott*, 437 U.S. 82, 91 (1978)).

The pertinent counts of the indictment[3] charged respondents with engaging in a scheme to defraud and using wire communications in furtherance of the scheme, as well as conspiracy to engage in the same scheme to defraud. To obtain a conviction on these charges, according to the law of the Ninth Circuit at the time of the district court's ruling, the government's proof at trial must have been sufficient to establish each part of the scheme to defraud alleged in the indictment. For example, if the indictment alleged six parts to the unitary scheme to defraud, the government was required to prove at trial that all six parts had indeed existed; otherwise conviction for the entire scheme would fail for lack of proof. *United States v. Mastelotto,* 717 F.2d at 1250. *United States v. Miller,* 715 F.2d at 1363.

It cannot be disputed that the district court found the proof at trial was insufficient to sustain a conviction for wire fraud as charged in the indictment. In ruling on respondents' motion for a judgment of acquittal, the district court reviewed the evidence as to the six benefit plans described in the indictment and explicitly stated that there was "practically no evidence" and "absolutely no evidence" of fraud with respect to four of them. App. to Petition at 36a. The court therefore ruled that "in the light of the evidence a reasonable juror could not find beyond a reasonable doubt that the defendants had participated in a unitary scheme to defraud as charged in the indictment." *Id.* at 36a-37a. In sum, the court considered the govern-

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[3] Counts 12 and 13 of the indictment were dismissed before trial in a ruling reversed by the court of appeals. They are not involved in the government's petition.

ment's evidence in light of the legal requirements for conviction, and found it insufficient.

Accordingly, this case is indistinguishable from many cases in which this Court has held that the Double Jeopardy Clause bars a government appeal or a retrial. *See, e.g., Smalis v. Pennsylvania,* — U.S. —, 106 S. Ct. 1745, 1748-49 (1986); *Arizona v. Rumsey,* 467 U.S. 203, 211 (1984); *Sanabria v. United States,* 437 U.S. 54, 78 (1978); *Fong Foo v. United States,* 369 U.S. 141, 143 (1962). In these cases this Court has repeatedly rejected attempts by the government to appeal erroneous trial court rulings as to the sufficiency of evidence. Only weeks ago this Court reaffirmed that " '[T]he fact that "the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles" . . . affects the accuracy of that determination but it does not alter its essential character.' " *Smalis v. Pennsylvania,* 106 S. Ct. at 1748-49 n.7, (quoting *United States v. Scott,* 437 U.S. 82, 98 and 106 (1978)) (opinions of the Court and of Justice Brennan, dissenting).

In the attempt to evade the reach of this Court's precedents, the government asserts that a new criterion should be introduced into Double Jeopardy Clause analysis. The government argues that the district court's finding of insufficient evidence is not an "acquittal" because "the district court mistakenly believed" that the government was required to prove additional facts. Petition at 11. The government's argument is completely dependent on its characterization of the district court's ruling as one that involved only "nonessential factual averments." Petition at 8. It cannot be disputed that the district court believed

that "essential" facts had not been proved. The district court erred, in the government's view, in determining *which* facts were essential to a conviction. The government contends that because of this error the district court's finding that the evidence was insufficient to allow a conviction was not an acquittal.

But on this very point this Court has decided at least two cases that directly refute the government's contention. In *Smalis v. Pennsylvania,* the Commonwealth argued that the trial court " 'erred in deciding what degree of recklessness was required to be shown under Pennsylvania's definition of [third degree] murder.' " 106 S. Ct. at 1748 n.7 (quoting the transcript of oral argument). The Commonwealth contended, in other words, that the trial court had erred in its interpretation of what facts—bearing on the degree of negligence—were essential to a conviction. If the district court's ruling in the instant case was not an "acquittal" because of error in determining which were the essential facts, then neither would the trial court's ruling in *Smalis* have been an acquittal. But this Court unanimously held in *Smalis* that such a challenge to the trial court's reasoning has no bearing on the double jeopardy issue. Regardless of legal error as to what facts are, indeed, essential, the trial court's ruling was an acquittal.

To the same effect is *Sanabria v. United States,* 437 U.S. 54 (1978). *Sanabria* involved a trial court's legal error in ruling that to convict under a law proscribing an "illegal gambling business" the prosecution was required to prove that the defendant was involved with "games of competition," which, according to the trial

court, included horse races but not numbers-betting. 437 U.S. at 56-58. Disregarding evidence of numbers-betting, the trial court entered a judgment of acquittal because there was no evidence of horse-betting. On the government's appeal, the First Circuit held that the trial court had erroneously interpreted the charges to include only horse-betting and that this erroneous ruling did not bar retrial of the numbers-betting charges. The First Circuit noted that the district court had not found evidence of the numbers-betting charge insufficient but had, in effect, erred in defining what evidence was essential to prove the offense charged. *Id.* at 61-62.

This Court reversed the First Circuit's decision, holding that "the Double Jeopardy Clause absolutely bars a second trial in such circumstances." *Id.* at 78.

The numbers-betting charge in *Sanabria* is like the parts of the alleged scheme about which the district court, in the instant case, made no explicit finding that evidence was lacking. This Court held that the Double Jeopardy Clause barred a second trial in *Sanabria* on the numbers-betting, notwithstanding that the district court had erred as a matter of law when it ruled that evidence of numbers-betting was not sufficient for a conviction. Thus, in *Sanabria* this Court rejected an argument equivalent to the government's contentions here.

This Court's decision in *Arizona v. Rumsey*, 467 U.S. 203 (1984), reinforces the conclusion that the double jeopardy bar applies in this case. *Rumsey* involved a trial court's legal error in defining the elements the government was required to prove in the sentencing phase of a capital case. Although the state appellate court subse-

quently held that the trial court's legal conclusion in framing the required elements had been erroneous under state law, this Court held that the Double Jeopardy Clause barred reprosecution of the defendant's sentencing phase. 467 U.S. at 211. "Reliance on an error of law . . . does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits." *Id.*

The government attempts to distinguish *Smalis* and *Sanabria* by asserting that "the district court merely found that the government's failure to prove averments in the indictment resulted in a violation of respondents' rights under the Grand Jury Clause." Petition at 11 and 10 n.10. According to the government's theory, the district court's ruling was not an "acquittal" because the district court based its "mistaken belief" about what evidence was essential on the Grand Jury Clause. Petition at 11. Thus, the applicability of the Double Jeopardy Clause turns, in the government's view, on whether the district court was relying *solely* on the statutory elements of wire fraud or conspiracy as the basis for its finding that the evidence was insufficient. If the district court based its finding on *both* the statute defining the offense and cases construing the Constitution so as to create further requirements as to the proof sufficient for conviction of the offense charged, then, the government argues, an acquittal has not occurred.

But there is no precedent of this Court supporting this view. Moreover, the government's view is irreconcilable with the long line of this Court's decisions holding a finding of insufficient evidence to be an acquittal even if it is based on an erroneous understanding of the law

defining what facts must be proved to sustain a conviction. *Smalis,* 106 S. Ct. at 1748-49; *Sanabria,* 437 U.S. at 68-69. These cases must be read to hold that, where a district court has terminated a trial favorably to defendants based on findings as to the sufficiency of evidence, scrutiny of the reasoning underlying the findings is irrelevant and impermissible for purposes of double jeopardy analysis.[4]

The government attempts to draw an analogy between the district court's ruling in this case and the category of cases involving dismissal of an indictment as legally insufficient to allege a crime despite sufficient proof at trial. Simply put, the rulings in the latter category are not acquittals because they do not involve any " 'resolution of factual issues going to the elements of the offense charged'," *Smalis,* 106 S. Ct. at 1749, (quoting *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 570 (1977)). *See Lee v. United States,* 432 U.S. 23, 26 (1977); *Illinois v. Somerville,* 410 U.S. 458, 459 (1973).

The district court's ruling in the instant case was denominated an acquittal, and correctly so. It terminated the action based on the insufficiency of evidence to convict respondent of the offenses charged in the indictment. *Smalis, Sanabria,* and other decisions of this Court preclude the government's attempt to avoid the Double

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[4] The government cites *Russell v. United States,* 369 U.S. 749 (1962), and *Stirone v. United States,* 361 U.S. 212 (1960), in which *defendants* successfully appealed from convictions based on facts not charged in their indictments. (*See* the discussion of *Stirone* in *United States v. Miller,* 105 S. Ct. at 1816-17.) Neither case involved a double jeopardy question, neither involved any finding—correct or erroneous—of insufficiency of evidence, and neither supports the government's position.

Jeopardy Clause by parsing the thought processes involved in the district court's finding of factual insufficiency.

II. THE GOVERNMENT'S THEORY, THAT THERE IS NO DOUBLE JEOPARDY BAR WHEN THE TRIAL COURT FINDS THAT THERE IS INSUFFICIENT PROOF OF "NONESSENTIAL FACTUAL AVERMENTS", DOES NOT APPLY TO THIS CASE.

The government asserts that the district court made findings only as to "nonessential factual averments." If, by its use of the phrase "nonessential factual averments", the government means that the allegation of six, rather than five or fewer parts of the scheme to defraud was "nonessential" to a valid indictment, then its point is irrelevant to the issue at hand. The validity of the indictment in this case is not disputed; indeed, the district court expressly ruled that the indictment was sufficient. App. to Petition at 35a. If, on the other hand, the government's argument is that the proof of all six parts of the scheme alleged in the indictment was "nonessential" to obtain a conviction, then its argument must fail. As stressed in the preceding section, even if the district judge was mistaken in treating certain proof as "essential" to sustain a conviction, its ruling in favor of the defendants was an acquittal.

Moreover, this proof *was* essential to sustain a conviction according to prevailing Ninth Circuit law at the time. The government's petition does not challenge the holding of the Ninth Circuit that the district court correctly applied the Ninth Circuit's rulings in *Mastelotto* and *Miller*. And the government's petition does not, and cannot, chal-

lenge the holding of the Ninth Circuit that under its *Mastelotto* and *Miller* cases it was essential to a conviction for the government to prove averments for which there was absolutely no evidence.[5]

The government is thus left with only one argument in this context, and this argument is not explicit in its petition; that is, that this Court's reversal of *Miller* subsequent to trial justifies a retrial. The reason why this proposition is only implicit in the government's general argument is obvious: The Double Jeopardy Clause would be eviscerated if changes in the law subsequent to trial could justify retrial.

This Court has described "the most fundamental rule in the history of double jeopardy jurisprudence" as the principle that "'[a] verdict of acquittal . . . [may] not be reviewed . . . without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (quoting *United States v. Ball*, 163 U.S. 662, 671 (1896)). If the Double Jeopardy Clause forbids a court from reversing an acquittal by changing the law on appeal in the same case, it necessarily forbids a court from reversing an acquittal because the law has been changed by a decision in another case. This Court has stated that the Double Jeopardy Clause "guarantees that the state shall not be permitted to make repeated attempts to convict the accused, 'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a con-

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[5] The government did not appeal and does not now challenge the district court's explicit findings of insufficiency of evidence.

tinuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' '' *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)). This guarantee is empty if changes in the law subsequent to trial are given any consideration whatsoever in determining the conclusiveness of a trial court's judgment of acquittal.

III. THE CIRCUITS ARE NOT IN CONFLICT.

The government places its heaviest reliance on the Third Circuit's decision in *United States v. Maker*, 751 F.2d 614 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 3479 (1985). But the language the government quotes from *Maker* would be error if applied in the different procedural context of this case.

Maker involved not a judgment of acquittal after the government's case in chief, but a dismissal after a hearing on the first day of testimony in the trial. The district court reviewed the indictment and certain transcripts of defendants' testimony from a civil trial. *Maker*, 751 F.2d 619-20. In *Maker* the procedural posture of the hearing on defendants' motion was not one that subjected them to the risk that they would be found guilty nor one that involved an assessment of sufficiency of the evidence the government had offered.

The district court in *Maker* made a legal error in concluding that a wire fraud charge requires the government to prove that *before* the first act furthering a scheme to defraud, the defendants intended and planned every act that ultimately played a part in the scheme. *Maker*, 751

F.2d at 619. Before the government had called its second witness, the district court declared it "impossible" to prove an intent to submit fraudulent insurance claims concerning accidents that had not yet occurred. *Id.*

Accordingly, the district court in *Maker* did not purport to assess the sufficiency of the prosecution's evidence, but rejected the logic of the prosecution's *proposed* factual theory. A far different kind of decision was made in the instant case, where the district court had heard the prosecution's case in chief and found a lack of evidence of facts it considered essential. This difference between this case and *Maker* means that the circuits are not in direct conflict.

Some language in *Maker* suggests that the double jeopardy effects of a decision turn solely on whether it involved error in a "legal determination about the elements of a single scheme conviction." 751 F.2d at 623. Based on its facts, *Maker* need not be reduced to this proposition; but the proposition, applied to the instant case, would be contrary to this Court's interpretation of the double jeopardy protection in *Smalis v. Pennsylvania*, 106 S. Ct. at 1748-49; *Sanabria v. United States*, 437 U.S. 54, 75; *Arizona v. Rumsey*, 104 S. Ct. 2305, 2310-11; and *Fong Foo v. United States*, 369 U.S. at 141, 143. A "conflict among the circuits" created by a circuit decision at odds with this Court's decisions is no reason to grant a petition for certiorari in a case consistent with this Court's precedents. *See, e.g.*, Rules of the Supreme Court, Rule 17(c) (noting that a writ of certiorari is appropriately granted in order to resolve a conflict in the federal courts over a question which "*has not been*, but should be, settled by this Court") (emphasis supplied).

This Court's subsequent decision in *Smalis*—that a ruling of insufficiency of evidence is an acquittal even if based on an erroneous legal premise as to what facts are required for a conviction—has resolved any potential for uncertainty. Moreover, the Third Circuit has in its decision in *United States v. Giampa*, 758 F.2d 928 (3d Cir. 1985), subsequently correctly applied the pertinent principles under the Double Jeopardy Clause.

In *Giampa*, the Third Circuit held that the Double Jeopardy Clause barred retrial of a defendant acquitted of extortion and various related crimes. The trial judge had made some comments during the course of the trial which seemed to indicate that he would order an acquittal because of the government's failure to disclose some evidence arguably helpful to defendant, in violation of the rule of *Brady v. Maryland*, 373 U.S. 83 (1963). 758 F.2d at 934. If the trial judge had ordered an acquittal on the basis of the *Brady* violation alone, the Double Jeopardy Clause would not bar retrial. The trial judge, however, also made statements which purported to evaluate the sufficiency of the government's evidence. The Third Circuit held that this evaluation, which resulted in a favorable judgment for the defendant, amounted to an acquittal according to the standards of *Martin Linen* and *United States v. Scott*. 758 F.2d at 934.

Accordingly, *Maker* does not justify granting the government's petition for certiorari in the instant case.

Finally, the government's broad claim that the Ninth Circuit's ruling "raises doubts about the double jeopardy consequences of every district court order granting relief

to a defendant because of a fatal variance between the allegations on the indictment and the proof at trial" (Petition at 12) is simply not true. The "fatal variance" in this case led to an acquittal because of the particular—and now overruled—precedents of the Ninth Circuit regarding evidence required to prove mail fraud and wire fraud. Under this Court's long line of cases, an acquittal that was based on those Ninth Circuit precedents bars appeal by the government, even though the precedents were erroneous, because of the protections of the Double Jeopardy Clause.

CONCLUSION

For each of the reasons stated above, the Petition for Certiorari should be denied.

Respectfully submitted,

JAMES J. BROSNAHAN*
JACK W. LONDEN
KAREN SNELL
MORRISON & FOERSTER
California Center
345 California Street
San Francisco, CA 94104
(415) 434-7000

Attorneys for Respondent
Sol C. Schwartz

*Counsel of Record

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No. 85-2031

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

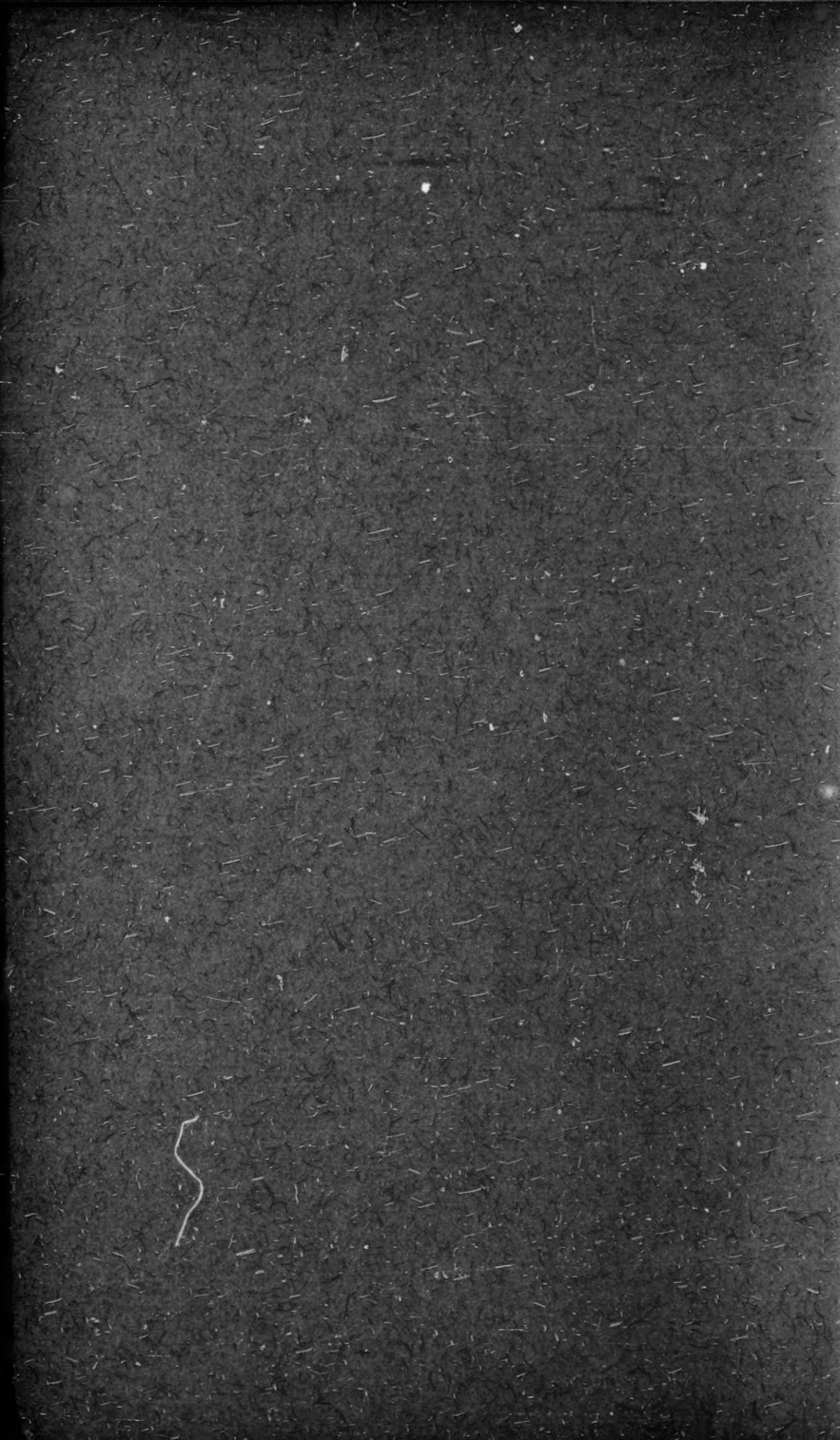
v.

SOL C. SCHWARTZ AND RAYMOND F. LANE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217



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1. The district court entered judgment for the defendants in this case because of what it described as a "fatal variance" between the indictment and the proof at trial (Pet. App. 30a). The court of appeals noted that the cases supporting this conclusion were "based on the Fifth Amendment's grand jury guarantee" (Pet. App. 7a). The only factual question resolved by the district court was whether the government had shown a scheme to defraud that was as broad as the one charged in the indictment—not whether the government had shown a scheme to defraud. Nonetheless, the court of appeals dismissed the government's appeal as barred by the Double Jeopardy Clause on the theory that the district court's action amounted to a finding that the evidence was insufficient to support a conviction.

Respondent Lane contends that the analysis of the court of appeals was correct. He argues (Lane Br. in Opp. 3-4) that the district court found that the government failed to

prove "some or all of the factual elements of the offense charged" (*United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)) when it found that the evidence was insufficient with respect to four of the six alleged victims of respondents' fraudulent scheme. As we showed in our petition, however, the necessary "element" of wire fraud is the existence of a fraudulent scheme, not the existence of the precise scheme alleged in the indictment. When it held in earlier decisions that the government must prove every object of the scheme alleged in the indictment, the Ninth Circuit carefully explained that it was not expanding the "elements" of the offense of wire fraud but was imposing a requirement based on its reading of the Grand Jury Clause (see Pet. 9 n.9).

Respondent Schwartz, in similar fashion, argues that the district court treated the existence of a unitary scheme with six victims as an "essential" fact, and that an error as to what facts are essential does not affect the factual nature of the judgment (Schwartz Br. in Opp. 5-6). But this is not a case like *Smalis* v. *Pennsylvania*, No. 85-227 (May 5, 1986), where the trial court misunderstood the elements of the offense of third-degree murder and was led by that misunderstanding to hold that the proof did not show that the defendants had committed the offense.[1] This is a case in which the court held that a "fatal variance" and the protections of the Grand Jury Clause precluded a conviction under an indictment drafted in a particular way, *whether or not* the proof showed that respondents were factually guilty of committing wire fraud and conspiracy as the court understood those crimes.

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[1]Likewise, this case is not like *Arizona* v. *Rumsey*, 467 U.S. 203 (1984), where the trial court misunderstood the meaning of the statutory aggravating circumstance that a murder was committed "as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value" and was led by that misunderstanding to hold that the proof did not support a finding of that aggravating circumstance.

Respondent Schwartz acknowledges that the district court's ruling rests not on any determination that the government had failed to prove the statutory elements of wire fraud and conspiracy, but instead on "cases construing the Constitution so as to create further requirements as to the proof sufficient for conviction of the offense charged" (Schwartz Br. in Opp. 8). Under this Court's precedents, that distinction is crucial. As this Court observed in *United States* v. *Scott*, 437 U.S. 82, 98 n.11 (1978), "a defendant who has been released by a court for reasons required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of that word." The Double Jeopardy Clause does not bar retrial "where the defendant * * * obtains the termination of the proceedings against him in the trial court without any finding by a court or jury as to his guilt or innocence. He has not been 'deprived' of his valued right to go to the first jury; only the public has been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.' " *Id.* at 100 (quoting *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978)).

2. Respondents contend (Schwartz Br. in Opp. 6-7; Lane Br. in Opp. 4-6) that this case is controlled by *Sanabria* v. *United States*, 437 U.S. 54 (1978). But there is only a superficial similarity between Sanabria's "acquittal" on the nonessential averment that he was connected with horse betting and respondents' "acquittal" on the nonessential averments in this case. The trial court in *Sanabria* refused to admit the evidence connecting Sanabria with numbers betting and then found a lack of evidence connecting him with horse betting. This Court held that "the ruling below is properly to be characterized as an erroneous evidentiary ruling, which led to an acquittal for insufficient evidence" (437 U.S. at 68-69 (footnote omitted))—a description that cannot be fitted to this case.

The *Sanabria* Court also assumed for the sake of argument that "the District Court 'dismissed' the numbers allegation" (437 U.S. at 69). Once that allegation was dismissed, the indictment still contained an averment that Sanabria was "connected with" an illegal gambling business engaged in horse betting, and that averment was sufficient to charge a violation of 18 U.S.C. 1955. But the district court then reached a factual determination that Sanabria was not "connected with" the illegal gambling business that was still alleged in the indictment. The ultimate determination that Sanabria was not "connected with" the illegal gambling business was factual, even though it was affected by an erroneous legal ruling along the way that had narrowed the indictment. See 437 U.S. at 70-73.

This case would be comparable to *Sanabria* if the district court had first, for some reason, deleted from the indictment (or excluded evidence on) the charges of defrauding the two Local 28 Oakland benefit plans, and had then reached a factual determination that respondents were not guilty of the scheme to defraud the four other benefit plans that were left in the indictment. But the district court did just the opposite: it resolved the factual questions concerning the other four benefit plans first and then reached a legal conclusion that the allegations concerning the Local 28 benefit plans must be dismissed, whether or not the facts proved at trial supported those allegations. Although the district court resolved some of the factual allegations supporting the scheme to defraud, its ultimate termination of the trial was based on a purely legal consideration: the Grand Jury Clause rule established by the Ninth Circuit's decision in *United States* v. *Miller*, 715 F.2d 1360 (1983), modified, 728 F.2d 1269 (1984), rev'd, No. 83-1750 (Apr. 1, 1985).

3. Respondents are unsuccessful in their attempts (Schwartz Br. in Opp. 13; Lane Br. in Opp. 7) to show that the decision below does not conflict with *United States* v. *Maker*, 751 F.2d 614 (3d Cir. 1984), cert. denied, No. 84-1419 (June 17, 1985). In *Maker*, as in this case, the district court granted judgment for defendants after the jury had been empaneled and the presentation of testimony had begun. It is true that the district court in *Maker* acted before the government had finished presenting its case in chief, and it is also true that the court did not denominate its ruling a "judgment of acquittal." But neither fact distinguishes *Maker* from this case. Respondents point to no opinion of this Court or any court of appeals that treats one type of midtrial dismissal differently from another based on how much of its case the government was allowed to put on; and, as the cases cited in our petition make clear (Pet. 8 n.8), it is the substance of a trial court's action, not its label, that determines the double jeopardy consequences.

The key question is whether the "essential character" (*Scott*, 437 U.S. at 98) of the district court's ruling was factual or legal. In *Maker*, the court of appeals held that the essential character of a midtrial judgment for defendants was legal when it was based on a determination that "a single scheme conviction requires proof that the defendant had planned the scheme in its major details before any aspect of the scheme is implemented" (751 F.2d at 623). In this case, the court of appeals held that the essential character of a midtrial judgment for defendants was factual when it was based on a determination that a "unitary scheme" conviction requires proof that the details of the scheme (including the identity of the victims) were identical to those alleged in the indictment. Those two holdings are in conflict.

Respondent Schwartz virtually concedes the existence of a conflict by suggesting that certiorari should not be granted because *Maker* is "at odds with this Court's decisions" (Schwartz Br. in Opp. 13). For reasons already elaborated, we believe that the decision below was incorrect and that, correspondingly, the decision in *Maker* was correct. In any case, it is plain that the lower courts have been unable to agree on the implications of this Court's decisions, and review by this Court is appropriate to clear up the confusion.

4. Respondent Lane suggests (Lane Br. in Opp. 4 n.6, 8) that certiorari should be denied because this case does not present an issue that is likely to recur. But the logic of the decision below would suggest that a district court's entry of judgment for defendants raises a double jeopardy bar whenever the trial court examines the facts for any purpose.[2] Among other things, that logic would preclude a government appeal or retrial any time that a trial court finds a fatal variance between the indictment and the proof at trial, no matter how strongly the facts proved at trial show that the defendant is guilty of a criminal offense (and no matter how erroneous the ruling of the trial court). Thus, the ruling below portends sweeping consequences that deserve the attention of this Court.

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[2]Indeed, respondent Schwartz advances the radical proposition that, "where a district court has terminated a trial favorably to the defendants based on findings as to the sufficiency of evidence, scrutiny of the reasoning underlying the findings is irrelevant and impermissible for double jeopardy analysis"—even when there is no hint of factual innocence in the district court's findings (Schwartz Br. in Opp. 9).

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

AUGUST 1986